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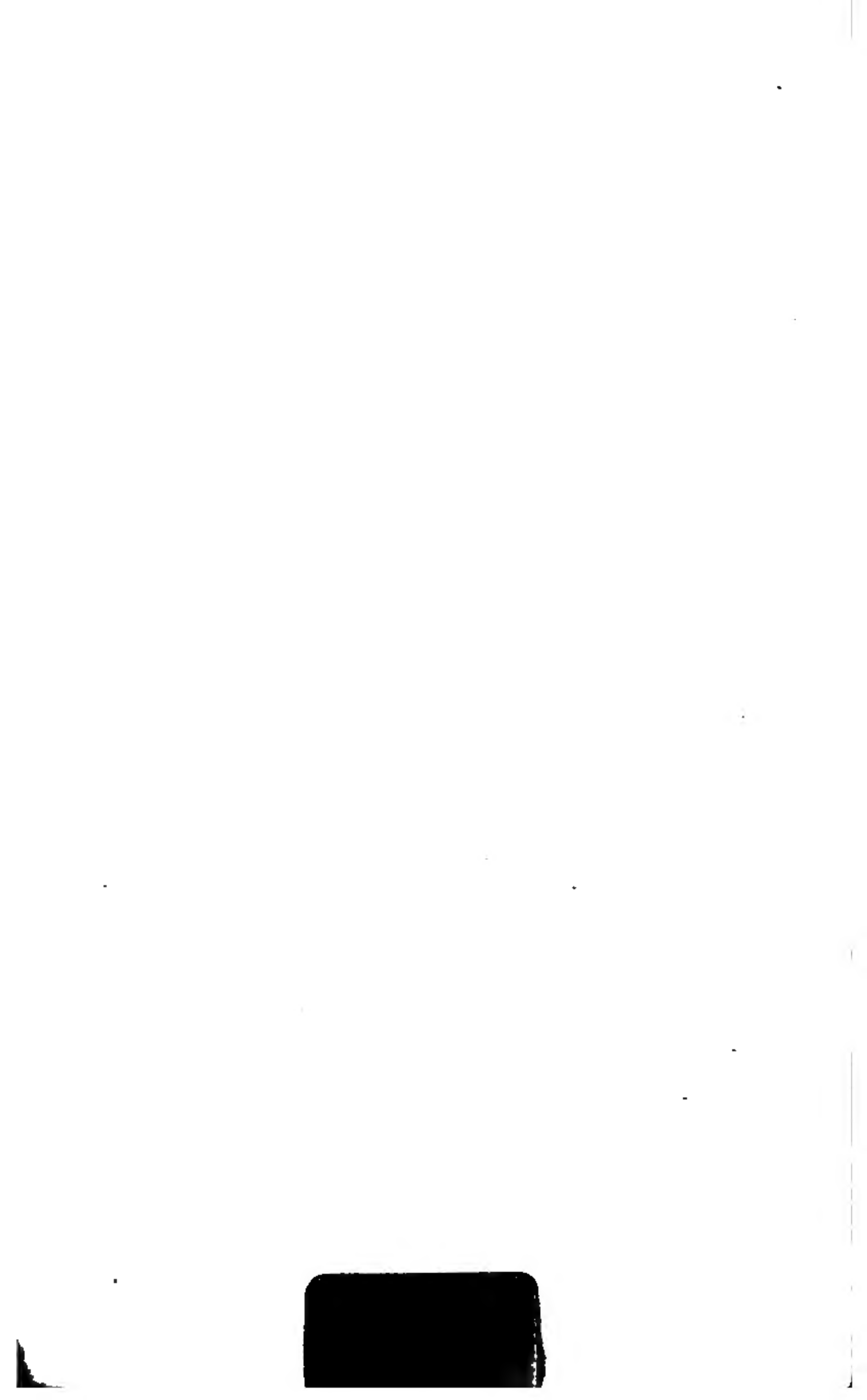
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REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, S. MACNAGHTEN, AND A. GORDON, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. IV.

1853, 1854, 1855.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1872.

a-55385

JUL 8 1901

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

HARINGTON v. MOFFAT.

1853. April 18, 23. Before the LORDS JUSTICES.

A shareholder in an assurance company bequeathed all and every his "shares and interest" in the company, and "all the advantages to be derived therefrom." There was also a general residuary bequest. The rules of the company required each shareholder to effect, or procure to be effected, an assurance to a prescribed amount, and provided that one-third of every bonus on a policy should be added to the capital of the company: *Held*, upon the whole context of the will and codicils, that neither the moneys made payable by a policy effected by the testator on his own life nor the proportion of a bonus payable in respect of the policy passed under the above words to the specific legatees.

THIS was an appeal from the decision of the Master of the Rolls upon a special case, which stated in substance as follows:—

William Moffat, who was domiciled in England, made a will, or deed of disposition, in the form used in Scotland, and bearing date the 5th of August, 1834, and thereby gave, granted, and disposed to and in favour of Alexander Allan, Esq., and the Rev. Henry Duke Harington, and Alexander Moffat Allan, or to such of them as should accept the trust, certain lands in Scotland, therein mentioned. The testator made a first codicil not material to be stated. By a second codicil, dated the 22d of September, 1841, after disposing of lands and heritages, he bequeathed, devised, and disposed to and in favour of his trust disponees and their foresaids: First. All his freehold house therein mentioned.

* 2 Second. The whole and all and every of his shares * and interest in the Rock Life Assurance Company on lives and survivorships, and all the advantages to be derived therefrom. Third. The whole and all and every of his shares and interest in the Metropolitan Loan and Investment Company. Fourth. The whole and all and every of his shares and interest in the City of New York five per cent water stock. Fifth. The whole and all and every his shares and interest in the Reversionary Interest Society. After making other specific bequests, the codicil proceeded to declare the trusts of these gifts, which, as to the testator's interest in the Rock Life Assurance Company, were expressed in the words following: "Fifthly. I direct my said trustees to convey over to Captain William Douglass Harington, of the Madras Light Cavalry, my nephew, the whole and all and every my shares and interest in the Rock Life Assurance Company, London, on lives and survivorships, and all the advantages to be derived therefrom; and in the event of his death before me, to his child or children equally among them share and share alike, whom failing, to my own heirs." After making some other dispositions of various properties, the testator lastly directed his trustees, after paying and satisfying the above sums, bequests, legacies, and others, to hold the remainder and residue of his said means and estates conveyed over to them as aforesaid, and to invest the same as therein mentioned, and stand possessed of the investment upon certain trusts thereby declared. By a third codicil dated the 18th of August, 1847, the testator directed his trust disponees to convey to the child or children of Captain William Douglass Harington, then deceased, and to the child and children of Henry Duke Harington the whole and all and every of his "shares and interest in the Rock Life Assurance Company."

* 3 * The question was as to what passed by this codicil, and there were other parts of the will and codicils which were referred to besides those above set out as showing the sense in which the testator used the words "shares and interest," but these other passages appear sufficiently from the judgment of Lord Justice TURNER.

The Rock Life Assurance Society was not incorporated, but consisted of a body of proprietors, with a subscribed capital, and regulated by a deed of settlement, dated the 20th of August, 1807, of which the following were the material clauses:—

118. That every present and future proprietor of the company shall keep on foot one or more assurance or assurances with the company either on his or her own life, or on the life or lives of one or more approved nominee or nominees, amounting in the whole to 5*l*. at least on each of the shares held by him or her in the capital of the company, or shall procure two or more approved substitutes, each of whom shall keep on foot one or more assurance or assurances with the company, either on his or her own life or on the life or lives of one or more approved nominee or nominees, for any sum whatever, provided the whole amount of the sums to be assured to the substitutes be not less than double the sum for which the proprietor procuring such substitutes ought to have insured, and that every future proprietor shall be allowed three calendar months from the time he or she shall have become a proprietor, either by himself or herself, or by two or more such substitutes as aforesaid, to effect such assurance or assurances with the company.

125. That executors, administrators, legatees, or next of kin of deceased proprietors, and assignees of bankrupt * proprietors, * 4 shall not be proprietors of the company in respect of the shares held by them in the company's said capital in any of those capacities, and shall not be obliged to keep on foot any assurance with the company, and may, in the manner and upon the terms hereinafter mentioned, sell the shares so held by them.

155. That at the first court of directors after a bonus shall have been declared, the bonus so declared shall be divided into three equal parts.

156. That, at the same court of directors, one of the said equal parts shall be added to and consolidated with the subscription capital stock and form part thereof.

157. That, at the same court of directors, the remaining two equal third parts of such bonus shall be distributed amongst such persons, whether proprietors or not, who shall, at the time the same shall have been declared, have assurances on foot with the company upon and for the whole continuance of one or more life or lives (but in respect to such assurances only, and no others, which such persons or any of them may then have on foot with the company, and in respect only to so many of such assurances as shall not have been effected with the company in the then current year or the then last year preceding).

The testator became a proprietor of 200 shares in the company in the year 1814, and in the same year effected a policy of assurance with them on his own life for 1000*l.*, whereby the stock and funds of the society were made liable to pay that amount on his decease.

The shares held by the testator at the date of the last of * 5 the above-mentioned codicils, with the additions or * bonuses thereon, were of the value of 1200*l.*, or thereabouts, and remained standing in his name. Additions to the policy, by way of bonuses, were made and declared as follows: On the 20th of August, 1818, 80*l.*; on the 20th of August, 1826, 110*l.*; on the 20th of August, 1833, 234*l.*; on the 20th of August, 1840, 187*l.* 10*s.*; and on the 20th of August, 1847, 213*l.* 6*s.* 8*d.*; making altogether 824*l.* 16*s.* 8*d.*

One of the questions on which the opinion of the Court was sought was, whether, according to the true construction of the codicils, the specific legatees were entitled to a sum of 1887*l.* 9*s.* 2*d.*, 3*l.* per cent consolidated bank annuities, purchased by the executors with the moneys received by them in respect of the policy. The Master of the Rolls decided this question in the negative, holding that the moneys in dispute passed under the residuary bequest.

Mr. Roundell Palmer and *Mr. G. Simpson*, for the appellants, the specific legatees. — Some meaning must be given to the words “interest” and “advantages.” According to the decision appealed from, these words are of no effect. Independently of this consideration, the policy was, by the terms of the deed of settlement, appurtenant to the shares, and was effected in pursuance of the same contract by which the testator became a shareholder.

They cited *Richardson v. The Bank of England* (a) and *Douglas v. Andrews*. (b)

Mr. Lloyd and *Mr. Leach*, for the residuary legatees, * 6 * contended that, as there was a subject to which the words “shares and interest” could be properly applied, those words did not include an interest which could not with any accuracy be

(a) 4 M. & C. 165.

(b) 14 Beav. 347.

termed an interest in the company, being, in fact, a debt due from it.

Mr. W. J. Bovill, for the trustees.

Mr. Roundell Palmer, in reply.

Judgment reserved.

April 23.

THE LORD JUSTICE KNIGHT BRUCE. — The burden of the argument in this case was on the appellants, as alleging a particular and specific bequest in their favour, and therefore bound to show an intention in their favour, to which the respondents, who, being residuary legatees, must take the disputed property, unless given away from them, are not obliged. I think that the appellants fail in the contention.

How the matter would have stood if the testator had, in fact, not been a shareholder, or had said that he gave to the appellants all his shares and interest in the stock and funds of the Rock Assurance Company, it is not necessary to determine, for he has not so said, and he was a shareholder.

The bequest of his shares and interest in the company cannot, I think, be considered as carrying, in addition to his shares, the benefit of the policy which he held upon his own life, though, in effect, the payment of the sum assured was made by it a charge on the stock and * funds of the company. It is not, * 7 in my opinion, material that the testator, as a shareholder, was bound either to be a policy holder himself or to procure some person or persons to be so by way of substitution for him. In the nature of things, the benefit of the policy could not accompany the shares after his death, which converted it into a pecuniary demand payable at once. And as to what he says of "all the advantages to be derived therefrom," that, I conceive, is, if material at all, only material as demonstrating that he had no objection to a superfluity of words. By his shares and interest he meant, I think, his shares, the full benefit of the shares, his whole interest in them, and nothing else.

The conclusion of the Master of the Rolls appears to me, therefore, correct.

THE LORD JUSTICE TURNER.—This testator has given to the appellants thus, “the whole and all and every of my shares and interest in the Rock Life Assurance Company.” It appears that he had 200 shares in the company, and that by the rules of the office every holder of shares in that company is bound to assure for 5*l.*, or procure another person to do so, for each share. The testator accordingly had an assurance for 1000*l.*, and was entitled to bonuses upon that assurance to the amount of 824*l.* 16*s.* 8*d.* The question is, whether the policy of assurance for 1000*l.* and the bonuses thereon passed to the legatees by the description of the “whole and all and every of my shares and interest in the Rock Life Assurance Company.” If the testator had had no other interest than the policy and bonuses, I entertain little doubt that they would have passed by this description; for, though the policy is *prima facie* a claim against the company and not an * 8 * interest in it, still it gives a right to receive the amount assured, out of the funds of the company, and in this sense would be an interest in the company, and would answer the description if there were nothing else to answer it.

But here the testator had the shares, and there were bonuses, part of which, according to the company’s deed, were to be added to and form part of the shares, and the other part of which was to be added to and form part of the policy. The testator, therefore, may have used the words “interest in the Rock Life Assurance Company” in one of three senses,—either to describe the interest in the policy as above referred to, or as identical with and more fully explaining the word “shares,” or the testator may have used it with reference to the bonuses upon the shares. We must look to the context to see in what sense he has used it.

With reference to the sense first suggested, of its being used to describe the policy, the description, to say the least of it, would be very inaccurate; for the policy is a claim upon the company and not an interest in it, and it is very singular, if he meant to pass the policy, that he did not mention it. It is not, therefore, very probable that he meant to describe the policy by this very inaccurate description.

But, examining further the language of the will with reference to the point secondly suggested, namely, whether the word “interest” is used in this will as more fully explaining the word “shares,” it appears that he has given other property in the same

terms ; for instance, he gives all his "share and interest in the Metropolitan Loan and Investment Society," all his "share and interest in the New York 5 per cent water stock," and all * his "share and interest in the British Colonial Bank and Loan * 9 Company." In one of the codicils under consideration there are these very remarkable expressions, "shares and interest which I formerly had in the Metropolitan Loan and Investment Company," and "I do hereby give the whole of my shares and interest in the British and Colonial Bank and Loan Company, if they shall be in my possession at my death." But there is a better clew to the expression in the will where the testator refers to shares in the Reversionary Interest Society in these words, "to hold the whole and all and every of my shares and interest in the Reversionary Interest Society, and to pay the interest, dividend, and annual produce or profit thereof to Elizabeth Margaret Douglas Money during her lifetime, and on her decease to convey the same, with any interest, dividend, or produce which may have become due thereon, to the lawful child or children of the said Elizabeth Margaret Douglas Money by her present husband." There, therefore, the testator has clearly used the word "shares" as equivalent to "interest," which he had previously used. I think that in that clause, and also in the expression which is used in the codicil, the word "interest" is used simply as synonymous with, or as more fully explaining, the word "shares."

This brings me then to the third use of the words which I have suggested with reference to the bonuses upon the shares. By the deed of settlement of the company, the bonuses are to be divided into three parts, of which one-third was to form part of the shares. It is true that the bonuses which are to be added to and form part of the shares would have passed under the word "shares" without the addition of the word "interest;" but the testator might well have intended to remove all doubt on their passing, and have inserted these words * to embrace them. And it is * 10 surely much more probable that he should have intended this than to describe the moneys payable under the policy by these words ; for the additions made by this portion of the bonuses much more nearly answer the description of "interest" in the Rock Assurance Company than the policy, which is a claim against it.

Reliance has been placed on the expression "advantages to be derived therefrom," but I think that these words do not affect the

question in favour of appellants. They are prospective, and, so far as they go, appear to me to bear against appellants, as showing that the testator was referring to something future, and not to the policy, from which no advantage could be derived after his death beyond the amount assured. I think, therefore, that the policy and bonuses do not pass, and that the appeal must be dismissed.

1853. April 21. Before the LORDS JUSTICES.

Where a debt not legally assignable has been equitably assigned for value, and the debtor has had notice of the assignment, all payments which he may thereafter make to the purchaser on account of the debt are well made so far as the debtor is concerned, although the purchaser may have sold the debt, provided the debtor has no notice of the sale;² nor is it absolutely necessary for him on making such payment to require production of the original assignment.³

A judgment debtor had left his residence in embarrassed circumstances. His brother-in-law paid the debt, took an assignment of it, and afterwards mortgaged it, but the mortgagees gave no notice of their security to the debtor, whose residence at that time it did not appear that they had the means of

¹ S. C., 17 Jur. 539; 22 L. J. Ch. 884.

² It is the notice of the assignment that binds the debtor, and devolves upon him an equitable obligation in favor of the assignee. The assignment operates between the assignor and assignee only, until the act of notice takes place which brings the debtor into the arrangement. PARKER C. J., in *Jones v. Witter*, 13 Mass. 304, 307; *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v. Todd*, 12 Mass. 281; MORTON J., in *Parkhurst v. Dickerson*, 21 Pick. 310; *Withington v. Tate*, L. R. 4 Ch. Ap. 288. Special notice, however, seems not to be necessary; it is enough if the party to be affected has such knowledge of facts and circumstances as ought to induce a reasonable belief of the fact. *Anderson v. Van Alen*, 12 John. 343; PARRIS J., in *Hackett v. Martin*, 8 Greenl. 77, 79; *United States v. Sturges*, 1 Paine C. C. 525; *Kellogg v. Krauser*, 14 Serg. & R. 137; *Cahoon v. Morgan*, 38 Vt. 234. The debtor is bound from the time of the notice, although he may not concur in the arrangement. *Spring v. S. Car. Ins. Co.*, 8 Wheat. 268; *Bell v. London and North-Western Railway Co.*, 15 Beav. 548; *Morrell v. Wootten*, 16 Beav. 197.

³ See *Bean v. Stimpson*, 16 Maine, 49; *Davenport v. Woodbridge*, 8 Greenl. 17; *Johnson v. Bloodgood*, 1 John. Ch. 51.

ascertaining. The brother-in-law possessed himself of property of the debtor, and a settlement of accounts took place between them (in which the judgment debt formed an item), ending with the payment of a balance to the judgment debtor, and a general mutual release of all claims, including the judgment debt. The judgment-debtor had no notice of the mortgage, but did not obtain or require the delivery up of the assignment of the judgment debt: *Held*, that the mortgagees had no claim upon him in respect of it.

THIS was an appeal from the decision of the late Vice-Chancellor PARKER, reported 5 De Gex & Smale, 760, where the facts are fully stated. The following statement will be sufficient for the purposes of this report.

In 1815 a testator named Jackson died indebted upon a promissory note, and having bequeathed part of his property, including a leasehold inn at Halifax, called the Anchor, to John Dobson, whom he appointed his executor, in trust for John Dobson for life. John Dobson paid interest on the promissory note until 1830, when he left Halifax without making any provision for payment of the debts of his testator remaining unpaid. In 1836 William Peel, the holder of the promissory note, recovered judgment upon it against Dobson for 146*l.* 15*s.* to be levied of the goods of Jackson. Thereupon a Mr. Watson (a brother-in-law of Dobson) took upon himself to arrange Dobson's affairs, without the knowledge of the latter, and having paid the 146*l.* 15*s.* due upon the judgment, took an assignment of it to himself in October, 1836.

* On the 30th of April, 1842, Watson mortgaged the judgment to Messrs. Stocks (the survivor of whom was the plaintiff), and handed to them the assignment to him. They gave no notice of their mortgage to Dobson, but it did not appear that they knew where he was to be found. * 12

In the spring of 1842, but at what precise period did not appear, Watson paid a visit to Dobson, who then lived at Eton, and whom Watson had not seen since he left Halifax in 1830. Upon this occasion Watson for the first time informed Dobson of the payment and assignment of the judgment debt. He also stated, as the fact was, that he had entered into the receipt of the rent of the Anchor Inn, and was by means thereof paying off the judgment debt. He made no allusion, however, to his having mortgaged the debt. A parol agreement was then come to that Watson should be the tenant of the Anchor, and continue to apply the rents of Dobson's property, including that of the Anchor, in pay-

ment of Dobson's debts until the whole of the debts (including the judgment debt) were satisfied.

Watson continued accordingly in the possession or receipt of the rents and profits of the Anchor Inn, and was frequently applied to by Dobson for an account of his dealings. At length, in the beginning of May, 1848, Dobson caused distress to be levied upon the goods of Watson in the Anchor for 54*l.*, that being the balance which Dobson believed to be due to him from Watson.

After some angry discussion an agreement was come to that Watson should pay Dobson 10*l.* in full of all sums due upon the account, and should release the judgment. Accordingly the 10*l.*

was paid, and a release was executed by Watson dated the * 13 11th of May, 1848. * This release recited the assignment of the judgment to Watson, that Watson had been for some years then past the tenant of the Anchor, that disputes had arisen respecting the rent, that there had been several other accounts and pecuniary transactions between Dobson and Watson, and that it had been agreed that all these disputes and accounts should be adjusted and settled in consideration of Watson paying to Dobson 10*l.* It then witnessed that in consideration of 10*l.* paid by Watson to Dobson, and of 10*s.* paid by Dobson to Watson each released the other from all demands with the usual general words. The deed of assignment of the debt to Watson was not asked for by Dobson, nor given up to him. It remained with the other deeds in the possession of Messrs. Stocks.

On the 15th of May, 1848, Watson became bankrupt, and Messrs. Stocks obtained from his assignees a release of the equity of redemption in the debt. In 1849 they for the first time gave notice of their title to Dobson (who had no previous notice of it), and required payment.

On Dobson's refusing to pay the debt over again, they took proceedings in the name of the representative of Peel (the original judgment creditor), to revive the judgment by *scire facias*, and succeeded in an application to the Court of Queen's Bench for that purpose, notwithstanding the opposition of Dobson.

One of the Messrs. Stocks died, and the survivor instituted the present suit as a creditor of the testator, Jackson, for the administration of his assets.

The Vice-Chancellor held that the plaintiff was not a creditor, and dismissed the bill.

* *Mr. Willcock* and *Mr. G. L. Russell*, in support of the * 14 appeal. — The plaintiff and his late partner had no means of giving notice to Dobson, who had left Halifax in embarrassed circumstances, and whose place of residence was not known and could not be discovered. They were in no default. They took every precaution in their power. Nor indeed was any notice necessary, for Watson had not then given any notice of the assignment to him. The defendant Dobson, on the other hand, after being acquainted with the assignment, did not take the precaution of asking for the deed before coming to a settlement; and having prevented Messrs. Stocks by his own conduct from giving him notice of their security, and having failed to take the most ordinary precaution, it is impossible for him to say that the equities between the parties are equal, even if the dealings between Dobson and his brother-in-law were perfectly *bonâ fide*, as to which the evidence is far from being conclusive in his favour, independently of the suspicious and unexplained circumstance of his not asking for the title-deed.

Mr. Malins and *Mr. Crofts*, for the defendant Dobson. — A man who buys an equity has no better title than his assignor. There is no evidence to show that notice could not have been given to Mr. Dobson; and even if there were, those who advance money on a debt without notice being given to the debtor of the change in the interest, necessarily run the risk of the debt being paid to the only creditor of whose claim the debtor is cognizant. Otherwise a debt could never be safely paid.

Mr. Elmsley and *Mr. Metcalfe* appeared for other parties.

* *Mr. Willcock*, in reply.

* 15

The following cases were referred to in the course of the arguments: *Cator v. Earl of Pembroke*, (a) *Coles v. Jones*, (b) *Etty v. Bridges*, (c) *Ryall v. Rolle*, (d) *Meux v. Bell*, (e) *Dearle v. Hall*, (g) *Jones v. Gibbons*, (h) *Whitbread v. Jordan*, (i) *Peacock v. Burt*. (k)

(a) 1 Bro. C. C. 301.

(b) 2 Vern. 692.

(c) 2 Y. & C. C. C. 486.

(d) 1 Atk. 165.

(e) 1 Hare, 73.

(g) 3 Russ. 1.

(h) 9 Ves. 407.

(i) 1 Y. & C. 303.

(k) Coote on Mortgages, 2d ed. 569.

A witness named Higham was examined *viva voce*. The purport of his evidence is sufficiently indicated in the judgments.

THE LORD JUSTICE TURNER. — This is a question of priority between two equitable titles, raising two points, — first, whether the plaintiff has, in truth, any equitable title in respect of which he claims priority; and secondly, whether he is entitled to the priority which he claims. With reference to the former of these points, it must be considered settled that to perfect the title of the assignee of a debt, notice to the debtor is necessary. That was so laid down by Sir J. WIGRAM in *Meux v. Bell*, (a) and I believe in conformity with antecedent and subsequent authorities. I think it a well-settled rule, founded upon clear principles. The debtor is liable, at law, to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid?

* 16 * If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment, in order to perfect the title of the assignee.¹

(a) 1 Hare, 73.

¹ Until notice of the assignment, the rights and interests of the debtor are in no way affected by it. *Loomis v. Loomis*, 26 Vt. 198; PARSONS C. J., in *Comstock v. Farnum*, 2 Mass. 96, 97; *Ryall v. Rowles*, 1 Ves. Sen. 348; *Jones v. Gibbons*, 9 Ves. 410; *Martin v. Sedgwick*, 9 Beav. 333; *Thompson v. Speirs*, 13 Sim. 469; *Waldron v. Soper*, 1 Drew. 193; *Ex parte Boulton*, 1 De G. & J. 163; *Foster v. Cockerell*, 9 Bligh N. S. 332; 3 Cl. & F. 456; *Dunster v. Glengall*, 3 Ir. Ch. Rep. 47. But if the assignment is made on good consideration and *bond fide* (*Giddings v. Coleman*, 12 N. H. 153; *Langley v. Berry*, 14 N. H. 82; *Powles v. Dilley*, 2 Md. Ch. 119), the creditors of the assignors cannot avoid or defeat it, by an attachment under the trustee, or other similar process, although the debtor had no previous notice of the assignment. *Littlefield v. Smith*, 17 Maine, 327, 328; SHAW C. J., in *Warren v. Copelin*, 4 Met. 598; PARSONS C. J., in *Dix v. Cobb*, 4 Mass. 511, 512; SEWALL C. J., in *Brown v. Maine Bank*, 11 Mass. 158; *Spring v. So. Car. Ins. Co.*, 8 Wheat. 268; *The United States v. Vaughan*, 3 Binney, 394; *Stevens v. Stevens*, 1 Ash. 590; *Beckwith v. The Union Bank*, 5 Selden, 211; *Muir v. Schenck*, 3 Hill,

Thus the case stands considered as a question of payment. Is there, then, any distinction between actual payment and a *bond fide* settlement of accounts between a debtor and his creditor without notice of any assignment? I see no substantial ground of distinction between actual payment and a release to the debtor founded upon a fair and *bond fide* arrangement.¹ I take the true

228. But the doctrine in England and in some of the States is otherwise; it being held that as between successive purchasers of a debt not legally assignable, the preference will be given to him who first gives notice to the debtor. *Ryall v. Rowles*, 1 Ves. Sen. 348; *Campbell v. Day*, 16 Vt. 358; *Barney v. Douglass*, 19 Vt. 98; *Ward v. Morrison*, 25 Vt. 593; *Loomis v. Loomis*, 26 Vt. 201; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 145; *Warren v. Copelin*, 4 Met. 594; *Woodbridge v. Perkins*, 3 Day, 364; *Judah v. Judd*, 5 Day, 534; *Bishop v. Halcomb*, 10 Conn. 444; *Foster v. Mix*, 2 Conn. 395; *Adams v. Leavens*, 20 Conn. 73; *Cladfield v. Cox*, 1 Sneed, 330; *Murdock v. Finney*, 21 Missou. 138.

¹ The assignee of a debt takes it subject to all the equities existing between the assignor and the debtor at the time the latter has notice of the assignment; and, in an action upon it in the name of the assignor, the debtor may avail himself of all matters in defence and set-off, existing at the time of such notice, and which he could have urged against the assignor, if the claim had not been assigned. SHEPLEY J., in *Bartlett v. Pearson*, 29 Maine, 9, 15; *Sanborn v. Little*, 2 N. H. 539; *Livingston v. Stubbs*, 4 John. Ch. 693; *Oliver v. Lowry*, 2 Harr. 46; *Jeffres v. Evans*, 6 B. Mon. 119; *Andrewes v. M'Coy*, 8 Ala. 920; *Ragsdale v. Hagy*, 9 Gratt. 409; *The Bank v. Fordyce*, 9 Barr, 275; *Green v. Hatch*, 12 Mass. 195; *Sargent v. Southgate*, 5 Pick. 312; *Comstock v. Farnum*, 2 Mass. 96; *Willis v. Twombly*, 13 Mass. 206; *Dyer v. Homer*, 22 Pick. 253, 256; *Weeks v. Hunt*, 6 Vt. 15; *Walker v. Sargent*, 14 Vt. 247; *Blin v. Pierce*, 20 Vt. 25; *Gray v. Thomas*, 18 La. An. 412; *Guerrey v. Perryman*, 6 Geo. 119; *Molloy v. French*, 13 Ir. Eq. 261; *Mostellen v. Bost*, 7 Ifed. Eq. 39; *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 25; *Cockell v. Taylor*, 15 Beav. 103; *Murray v. Lilburn*, 2 John. Ch. 441, 443; *Houlditch v. Wallace*, 5 Cl. & Fin. 629; *Ainslie v. Boynton*, 2 Barb. (S. C.) 258; *Gay v. Gay*, 10 Paige, 369; *Ward v. Ward*, 4 Ir. Ch. 215, 220; *Norton v. Rose*, 2 Wash. 233, 254; *Smith v. Parkes*, 16 Beav. 115; *Rolt v. White*, 31 Beav. 520. But the debtor can impose no other burdens, nor claim any other deductions: SHEPLEY J., in *Bartlett v. Pearson*, 29 Maine, 9, 15; *Jenkins v. Brewster*, 14 Mass. 294; *Greene v. Darling*, 5 Mason, 201, 214; *Duncklee v. Greenfield Steam Mill Co.*, 23 N. H. 245, 250; *Bishop v. Holcomb*, 10 Conn. 444; *Watson v. Mid-Wales Railway Co.*, L. R. 2 C. P. 593; he cannot diminish the amount equitably and justly due at the time of such notice by any matter of claim subsequently accruing, or by any subsequent payment to the assignor: SHEPLEY J., in *Bartlett v. Pearson*, 29 Maine, 9, 15; *Jefferson County Bank v. Chapman*, 19 John. 322; *Cummings v. Fullam*, 13 Vt. 434; *Brashear v. West*, 7 Peters, 608; *The Northampton Bank v. Balliet*, 8 Watts & S. 311; *Laughlin v. Fairbanks*, 8 Missou. 367; *Goodwin v. Cunningham*, 12 Mass. 193; *Greene v. Hatch*, 12 Mass. 195; *State*

question to be, whether there is evidence of there having been a fair and *bond fide* arrangement between the debtor and the only creditor of whose title the debtor had notice. Is there evidence that the arrangement between them in 1848 was a fair, *bond fide* arrangement for settlement and discharge of the debt? However this question might have stood on the evidence in the Court below (for the circumstances of the case are singular and peculiar), the examination of Mr. Higham upon that subject before us has removed all doubt as to there having been, in truth, a *bond fide* arrangement in 1848, when the release of the debt was executed. And there is strong confirmation of this evidence in the fact of a distress having been actually put in by Dobson in respect of a year and a half's rent, proving that he thought the amount due to be at least a year and a half's rent, and showing that, if we are to consider this a case of fraud, we must suppose that these parties in 1848, intending to make a fraudulent release, took the trouble of putting in the distress. I am satisfied that there was a *bond fide* settlement of * this debt by the deed of May, 1848, that there had then been no notice given to Dobson of any assignment to the plaintiff and his partner by Watson, and that the only title of which Dobson had notice was the title of Watson.

Equitable titles have priority according to the priority of notice. Now the plaintiff and his late partner gave no notice of their title till 1849, whereas the defendant gave notice of his in 1842, or, at all events, in 1848. It is unnecessary to advert to other considerations, since the ground on which the Vice-Chancellor rested the case is sufficient to dispose of it.

LORD JUSTICE KNIGHT BRUCE. — I feel some degree of doubt upon this case so far as the defendant Dobson merely is concerned,

v. Jennings, 5 Eng. 428; *Philips v. The Bank of Lewiston*, 6 Harris, 394; *Ridgway v. Collins*, 3 A. K. Marsh. 411; *Daviess v. Newton*, 5 J. J. Marsh. 89; *Stewart v. Kirkland*, 19 Ala. 162; nor can he avail himself, for that purpose, of any subsequent acts or admissions of the assignor: *Hackett v. Martin*, 8 Greenl. 77; *Webb v. Steele*, 13 N. H. 230; *Kimball v. Huntington*, 10 Wend. 675; *Frear v. Evertson*, 20 John. 142; *Matthews v. Houghton*, 1 Fairf. 420; *Reed v. Nevins*, 38 Maine, 193; *Fitzpatrick v. Beatty*, 1 Gilman, 454; nor of any release or discharge by him, given after such notice to the debtor. *Andrews v. Beecker*, 1 John. Cas. 411; *Raymond v. Squire*, 11 John. 47; *Dix v. Cobb*, 4 Mass. 508, 511; *Brown v. Maine Bank*, 11 Mass. 157, 158; *Anderson v. Miller*, 7 Sm. & M. 586.

but not enough to warrant me in giving my voice for a reversal.

I apprehend, however, that when a debt not legally assignable has been equitably assigned by the creditor to a purchaser for valuable consideration, and the debtor has had notice of the assignment, all payments which he may thereafter make to the purchaser on account of the debt must be considered as well made, so far, at least, as the debtor is concerned, notwithstanding that the purchaser may in fact, after notice of his purchase to the debtor, have sold or mortgaged the debt to some other person, provided that the payments were made by the debtor without notice of the latter sale or mortgage.¹ Nor do I conceive that, in such a case, it is incumbent on him, before making a payment to the original purchaser, to require the production or proof of the original assignment.

Now, upon the evidence here, the payments made by * Dobson to Watson previously to the deed of May, 1848, * 18 appear to have been all made without any notice, upon Dobson's part, of the title of the plaintiff and his deceased partner, or either of them; and that deed was executed, and the transaction which it exhibits took place also without any such notice. It is my impression that the particular circumstances and nature of the case furnish a sufficient apology to Dobson for not having required the production, or a reason for the non-production, of the assignment from Peel to Watson. I see no reason for doubting the integrity of Dobson or of Mr. Higham in the matter. If we ought to believe or assume in the plaintiff's favour, that Dobson had not notice of any title in Watson previously to the mortgage made by Watson to the plaintiff, I am still not satisfied that this ought to make any difference, as the plaintiff was only a mortgagee until a time clearly subsequent to that at which Dobson certainly had notice that Watson had purchased the debt due from Dobson and claimed it.

The appeal must be wholly dismissed.

¹ S. P. Mangles v. Dixon, 1 M'N. & G. 437.

* 19 * In the Matter of The JOINT-STOCK COMPANIES WINDING-UP ACT, 1848, and of The JOINT-STOCK COMPANIES WINDING-UP AMENDMENT ACT, 1849;

AND

In the Matter of The GERMAN MINING COMPANY.

The Case of SAMUEL BALL, WILLIAM HAIGH, FRANCIS RAMSBOTHAM, WILLIAM ROTHERY, WILLIAM WOOD-ROFFE, and EMILY DUNCAN HARVEY.

Ex parte WILLIAM CHIPPENDALE, CHARLES CHIPPENDALE, and THOMAS HUGHES.

1853. April 21, 22. May 5. 1854. May 11, 25. June 23. Before the LORDS JUSTICES.

A joint-stock company was formed in England for working mines in Germany, subject to the terms of a deed of settlement, which provided that the capital should be 50,000*l.*, and gave no powers to the directors to raise money except by the creation of new shares. That capital was paid up and proved insufficient for working the mines. The wages of the miners being in arrear, and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts and preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the company, not for payment of debts, but for carrying on the business of the company in its ordinary course, and they afterwards repaid the bankers these advances. The company was wound up under the Winding-up-Acts: *Held*, —

1. That the advances made by the shareholders to pay debts of the company might be set off by them with interest against a call.¹
2. That although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers, the directors being trustees, and in that character entitled to indemnity from their *cestuis que trustent* against expenses *bond fide* incurred.²

¹ See, as to interest, 1 Lindley Partn. (Eng. ed. 1860) 649, 650; *Ex parte* Bignold, 22 Beav. 176; *Hart v. Clarke*, 6 De G., M. & G. 254; *Winsor v. Savage*, 9 Met. 346; *Hodges v. Parker*, 17 Vt. 242; *Lee v. Lashbrooke*, 8 Dana, 214. As to set-off of debts against calls, see 2 Lindley Partn. 1140, 1141.

² In 1 Lindley Partn. (Eng. ed. 1860) 629, the learned author states it as the doctrine apparently established by the cases of *The German Mining Company* and *The Norwich Yarn Company* (22 Beav. 143), that, where

3. That the distinction between advances by shareholders to pay necessary expenses and a loan contracted by them is a sound one.¹

THIS was a motion on behalf of three contributories to the above company to discharge an order made by Master TINNEY, allowing certain sums to the respondents * (who were also * 20

directors of a company, acting *bonâ fide* and to the best of their judgment for the company, incur expenses in so doing, they are entitled to be reimbursed those expenses by the company, although the directors may have had no authority to incur such expenses, and could not have rendered the company liable to third persons for them. After stating the above cases and the grounds on which they were decided, the author remarks (p. 631): "The principle on which these decisions are based requires reconsideration; it is at variance with the established doctrine that an agent who exceeds his authority is not entitled to indemnity against the consequences of his unauthorized acts; and it goes far to place shareholders at the mercy of their directors, however carefully the powers of the managing body may have been defined and restricted." He then notices the cases of *Gillan v. Morrison*, 1 De G. & S. 421; *The Worcester Corn Exchange*, 3 De G., M. & G. 180; and *Cropper's Case*, 1 De G., M. & G. 147, and adds: "Those three decisions, and especially the last two, are strictly in conformity with the sensible rule that agents are not entitled to any indemnity from their principals in respect of unauthorized expenditure; and the writer ventures to hope, that this rule, so essential to the protection of shareholders against directors, will not be frittered away, and that the principle of *The German Mining Company's Case* will not receive further countenance." See further 1 Lindley Partn. 192 *et seq.*, 216, 217, 290-292, 638 *et seq.*, 645, 646; *In re Cefn Cilcen Mining Company*, L. R. 7 Eq. 88; *Troup's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225; *Lewin Trusts* (5 Eng. ed.), 425, 453, 456; *Zulueta's Claim*, L. R. 9 Eq. 270; *Giffard L. J.*, in *Martin v. Powning*, L. R. 4 Ch. Ap. 365.

¹ *In re National Permanent Benefit Building Society, Ex parte Williamson*, L. R. 5 Ch. Ap. 313, Lord Justice GIFFARD said: "A class of cases has been referred to, the principal of which are *In re German Mining Company*, and *In re Cork and Youghal Railway Company*, L. R. 4 Ch. Ap. 748, the latter of which was before the Lord Chancellor and myself, a short time ago; I have no hesitation in saying that these cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pitfield*, 1 P. Wms. 558, where there was a loan to an infant, and the money was spent in paying for necessaries, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from."

contributories) in their accounts, as a set-off against a call made under the Winding-up Acts.

The German Mining Company was established for the purpose of working mines in Prussia and Bavaria, under a deed of settlement bearing date the 2d of May, 1836. It had offices in London, and was completely registered under the Registration Acts. The deed provided that the capital of the company should consist of 50,000*l.*, divided into one hundred shares.

The following were the material clauses of the deed of settlement: —

4. That the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five nor more than nine; and that three of them shall, at all meetings of directors and for all purposes, be competent to act; and that the directors shall appoint and remove all officers and servants of the company, and award to them such salaries, wages, or other compensation as they shall think fit; and any director or directors shall be removable by a majority of votes at a general meeting of the shareholders specially convened for the purpose; and all boards of directors shall be held in London and not elsewhere, unless under the authority of a board in London.

11. That the directors shall have power to make such calls upon the shareholders to the extent of 500*l.* per share, as they shall think necessary, each call not exceeding 50*l.* per share, and one month's notice to be given of each call by notice in writing to the shareholders respectively, such notice to be sent by the gen-

* 21 eral or * twopenny post, and addressed to the shareholders respectively according to their place of residence for the time being, appearing in the books of the company for registering the shares; and in the event of the non-payment of any one of such calls within thirty days after the expiration of such notice, the directors shall give to such shareholder or shareholders neglecting to pay such call a notice in writing, to be transmitted as aforesaid, that unless such call be paid to the bankers of the company within thirty days next after the date of such notice, that the share or shares in respect of which such default shall be made will be liable to forfeiture; and if at the expiration of such last-mentioned thirty days the call or calls shall not be paid, the directors shall have the

power, though it shall not be compulsory upon them if they see reason to the contrary, to declare the share or shares in respect of which such default shall be made to be forfeited, and all dividends, profits, and advantages thereon to be for the benefit of the remaining shareholders, but without prejudice to the right of the directors to enforce such calls if they shall think fit.

12. That the directors shall provide and keep proper minute books and books of account for the manifesting the true state of the affairs and business of the company, which minute books and books of account shall be open to the inspection of any shareholder at the office of the company during all the usual hours of business.

13. That a general meeting of the shareholders shall be held some time in the month of March, 1837, and in the same month in every succeeding year, of which fourteen days' notice shall be given by letters addressed to the respective shareholders according to their respective residences for the time being, appearing in the * company's books, and transmitted by the * 22 general or twopenny post, and at such meeting the accounts of the company up to the 31st day of December preceding, and a general report of the affairs thereof, shall be made and reduced into writing and submitted to the shareholders, and that at such annual meeting any special business may be transacted if the same meeting be also convened as a special meeting in manner hereinafter provided.

14. That the directors may at any time call a special general meeting on giving seven days' notice by circular letter addressed and sent to the shareholders in manner aforesaid, in which circular it shall be stated that the object of the meeting may be known on inquiry at the office of the company, or the object of such meeting may, if the directors shall think fit, be stated in the circular by which such meeting shall be convened.

15. That any number of shareholders holding collectively not less than twenty shares, may at any time require the directors to call a special general meeting of the shareholders by giving notice in writing to the directors and signifying in such notice the object of such meeting; and if the directors shall neglect or refuse for seven days to call such meeting, the requisitionists shall be at liberty to call the same by giving fourteen days' notice by circular addressed and sent as aforesaid, signifying therein the object of

such meeting, or that it may be known on application at the office of the company.

16. That a majority of votes at any general or special general meeting, whether convened by the directors or by the shareholders, under the clause for that purpose hereinbefore contained, shall be binding and conclusive upon all the shareholders of the company in respect of any matter or thing which shall be brought before such meeting, notwithstanding the absence from such meeting or the non-acquiescence at such meeting or afterwards of any of such shareholders in the decision of such meeting, provided that shareholders holding or representing not less than thirty shares be present in person or by proxy at such meeting, and except in case a ballot shall be demanded and granted as hereinafter mentioned.

20. That the directors shall be and are hereby authorized to carry into effect the treaties of the said parties of the first part which are now pending or in contemplation for the acquisition of the several mines hereinbefore mentioned, and also to negotiate for and acquire such other mines as they shall think desirable for the interests of the company, and also to abandon or surrender, and discontinue the working of any of the mines already or hereafter to be acquired if it shall be deemed advisable so to do.

25. That a dividend shall be declared from time to time as often as the profits of the company will permit; but, before any such dividend shall be made, the directors shall set apart ten pounds per cent of such profits or of the produce to arise from the sale of any of the said mines as an accumulating fund, until such fund with the accumulations thereof shall amount to the sum of 10,000*l.*, which fund shall be invested in the names of any three of the directors in Government Securities; but it shall be lawful for the directors to appropriate any part not exceeding one-half of the said fund if the whole thereof shall be accumulated, or one-half of such part thereof as shall for the time being be raised and accumulated, for any purpose which may be deemed necessary or advantageous to the interests of the company, but the said directors shall from time to time again replace and accumulate such part of the said fund as shall be appropriated as aforesaid, before any further dividend shall be declared.

29. That all notices, notes, or circulars addressed and sent in

the cases herein mentioned by the general or twopenny post, shall for every purpose be sufficient notice to every shareholder of the company.

30. The company may be dissolved by two special general meetings to be called for that purpose, the second of such meetings to be held at a period of time not less than twenty-one days from the holding of the first meeting, and both such meetings to be convened by circular letters addressed and sent to the shareholders in manner aforesaid at least fourteen days prior to holding the same respectively, and in such circulars the object of such meetings shall be stated. Provided always that, for the purpose of voting and declaring a dissolution of the said company, at least three-fourths of the whole number of shares in the said company shall be represented at such two several special general meetings, and shareholders representing such three-fourths of the whole number of one hundred shares shall be present, either in person or by proxy, and shall actually vote in favour of such dissolution, and provided that no ballot be demanded and granted as hereinafter mentioned.

33. That in case it shall appear to be desirable to sell and dispose of any of the mines and property of the company, or to subdivide the shares therein, or to create new shares, or to subdivide the present shares, or to make any alteration in the constitution of the company, * or to propose any new rules, powers, * 25 or conditions for carrying on the same, or to rescind, alter, or make any additions to the clauses, powers, and provisions herein contained, or any other matter or thing which may not be or appear to be within the scope, intent, and meaning of these presents, it shall be lawful for the directors to call a special general meeting or meetings of the shareholders in manner aforesaid, for the purpose of taking such matter or subject into consideration and adopting or rejecting the same, and that such matter shall be disposed of, adopted, or rejected at such special meeting, or by the result of a ballot taken in pursuance thereof, as if the same had been a matter or subject hereby expressly made cognizable and determinable by a special meeting or ballot.

The one hundred shares in the company into which the mines and the produce and profits thereof were agreed to be divided were duly subscribed for; but eleven of such shares were subsequently

forfeited under the provisions of the deed of settlement, and the remainder were paid in full.

Further moneys being required for carrying on the operations of the company, the directors, in the month of March, 1841, proposed to issue new shares for such purpose. At a special general meeting of the shareholders, held on the 29th of April, 1841, resolutions were agreed to, in pursuance of which eighty-nine new shares of 50*l.* each were created. Eighty of these new shares were taken by holders of original shares, and the whole amount of such shares was paid up; but the remaining nine shares were never issued.

The moneys thus raised proved insufficient, and, in pursu-
 * 26 ance of resolutions passed at a special general * meeting of
 the shareholders, held on the 12th of April, 1842, other
 shares, called "new shares, second issue," were created. Other
 new shares, called "new shares, third issue," were created at the
 same meeting in like manner; and the calls on all of these shares
 which were taken had been long since paid up. Subsequently a
 fourth and fifth issue took place, and the calls on all the shares
 taken up had been paid; but very few of the last issue were taken
 up. The directors also from time to time borrowed moneys from
 the London and Westminster Banking Company, who were the
 bankers of the mining concern, to enable them to carry on the
 mines in the ordinary course, and they personally guaranteed
 the repayment of these advances.

The moneys thus provided still proved insufficient to carry on
 the mines, and the mining company became embarrassed. Reports
 were regularly issued to the shareholders, stating the above trans-
 actions, and showing the state of the company's affairs.

At a special meeting of the shareholders held on the 27th of
 July, 1846, it was resolved unanimously that the directors and
 trustees of the company should be authorized and directed to sell
 and dispose of the whole or any part of the mines and property of
 the company, as they might deem proper.

In consequence of the insufficiency of the funds, the wages of
 the miners fell into arrear, and debts were contracted. Proceed-
 ings were threatened, and in several instances commenced by the
 miners and creditors, in the Mining Courts of Germany, against
 the mines, under which proceedings the mines were liable to be
 seized. Pressing letters were written by the agents to the direc-

tors, who, with other shareholders, made advances, out of which the above demands were paid.

* On the 16th of March, 1849, an order was made by the * 27 Vice-Chancellor KNIGHT BRUCE, directing the affairs of the company to be wound up under the Winding-up Acts.

On the 3d July, 1849, the official managers, by their examination before the Master, stated that they had carefully examined the accounts of the company, and that the persons named in the schedule to the examination were creditors for the amounts set opposite to their names.

In this schedule a debt of 12,217*l.* 5*s.* was stated to be due from the company to the London and Westminster Bank; and the various sums which had been advanced by the directors and shareholders to pay the debts of the mining company, as above mentioned, were also stated to be due to them from the company.

The appellants were dissatisfied with this examination, and obtained leave from the Master to appear separately from the official manager. The Master allowed the sums stated in the schedule as debts; and against the allowance of the debt of 12,217*l.* 5*s.* claimed by the London and Westminster Banking Company the present appellants appealed to the Vice-Chancellor KNIGHT BRUCE, who, in March, 1850, directed that an action should be brought by the London and Westminster Bank against the official managers, to determine the legal liability of the company as regarded the claim of the London and Westminster Banking Company.

An action was accordingly brought, and ultimately decided against the plaintiffs. See *Burmester v. Norris*. (a)

* A call was then made, and the respondents claimed to * 28 set off against it the sums which they had personally advanced as above mentioned, to pay the debts of the company. The Master allowed these advances to be set off accordingly, and against that allowance the present appeal was brought by order directly to the Lords Justices.

Mr. Malins and *Mr. Drewry*, in support of the appeal. — The case is really the same as was decided in the Court of Exchequer in *Burmester v. Norris*, (a) for there cannot be a substantial dis-

(a) 6 Exch. 796.

inction between an advance by some of the shareholders to the directors to pay for goods supplied, and an advance by strangers for the same purpose, both proceedings being equally unauthorized. Such a distinction would be merely artificial. The case is like that of a club, in which it has been decided that the members are not liable beyond the amount of their subscriptions. They supply the committee with the requisite funds, and the committee have no authority to do more than spend the money thus supplied to them. The same principle is applicable to a mining company. The duty of the directors was to discontinue the mining operations when the capital was exhausted. They could no more borrow of the shareholders than of strangers. In *Hawtayne v. Bourne*, (a) it was expressly decided that the shareholders were not liable for moneys borrowed by their agent to pay arrears of wages to the miners. It would be very mischievous if directors had power, without the assent of the shareholders, to borrow money beyond the amount of the capital of the concern, and make them liable to repay what was so borrowed. In *Ricketts v. Bennett*, (b)

* 29 * WILDE, C. J., referring to *Dickenson v. Valpy*, (c) says that the result of that authority is, that, in a partnership for working mines, only such authority will be implied by law in a co-adventurer to pledge the credit of the rest as is usual and necessary for the purpose of carrying on the concern. And Mr. Justice MAULE in that case observed, with reference to *Crawshay v. Maule*: (d) "The ground of the decision in that case fails here. Lord ELDON thought that to be a partnership into which a stranger could not be obtruded against the wish of the general body. Here, however, there is no such restriction; any one of the co-adventurers might, at any time, dispose of his shares in the concern without consulting the rest." *Tredwen v. Bourne* (e) may be relied upon on behalf of the respondents; but there the defendants were held liable on the ground that they had by their acts authorized the proceedings of the directors. If the defendants had been merely shareholders who had taken no part in the management, the decision would have been different. *Hawken v. Bourne* (g) also proceeded on the evidence, showing a complete partnership.

(a) 7 M. & W. 595.

(d) 1 Swanst. 495.

(b) 4 C. B. 686.

(e) 6 M. & W. 461.

(c) 10 B. & C. 128.

(g) 8 M. & W. 703.

At all events, there is no ground for allowing interest on the advances.

They also referred to *Fisher v. Tayler*, (a) *Lloyd v. Freshfield*, (b) *Smith v. Coleman*, (c) *Prendergast v. Turton*, (d) *Ridley v. Plymouth Banking Company*. (e)

The Solicitor-General and *Mr. Greene*, for the respondents.

— * It cannot be said that the directors have exceeded their * 30 powers. *Hawtayne v. Bourne* (g) differs essentially from the present case, which is within the authority of *Tredwen v. Bourne*, (h) where it was laid down that the members of a mining company have authority to bind one another by dealings on credit, if that appears to be necessary. The moneys advanced by the respondents were absolutely necessary for the purpose of advantageously winding up the concern, and preventing the whole property of the company from being sacrificed. The *bona fides* of the proceeding is not questioned. The shareholders never expressed any disapprobation of it, although they were made fully acquainted with the state of the company's affairs. This is sufficient to prevent them now complaining of it. *Steigenberger v. Carr*. (i) The case is materially different from *Burmester v. Norris*, for the question there was, whether the directors had rendered the company liable to strangers in respect to a loan, and not whether sums expended by some of the partners *bonâ fide* to save the partnership property from ruin, ought to be allowed them in their accounts.

In the *Bank of Australasia v. Breillat*, (k) the Privy Council held that directors of a banking company had power to borrow upon grounds applicable to the advances now in question. *Mr. Pemberton Leigh*, in pronouncing the judgment of the Court, there said: "The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to

(a) 2 Hare, 218.

(b) 2 Car. & P. 325.

(c) 7 Jurist, 1053.

(d) 1 Y. & C. C. C. 98.

(e) 2 Exch. 711.

(g) 7 M. & W. 595.

(h) 6 M. & W. 461.

(i) 3 Man. & Gr. 191.

(k) 6 Moore, P. C. 152.

be made in employing his own moneys and those intrusted
 * 31 to * him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may often be impracticable, or the concern must be ruined." And the Privy Council there decided: 1st. That the directors of the Bank of Australia had the powers of managing partners in an ordinary banking partnership, and that amongst these was the power of borrowing money for the purpose of discharging the existing liabilities of the bank till the assets should be realized, and of discontinuing the bank if they thought such conduct essential to the interests of the shareholders; 2d. That the circumstances of the engagements of the directors to repay the loan being accompanied by other stipulations, some of which were *ultra vires*, did not discharge the bank from liability to repay the loan, as the only effect of those stipulations was that they could not be enforced.

They also referred to *Carlen v. Drury*, (a) *Brown v. De Tastet*. (b)

Mr. Malins replied.

Mr. Drewry referred to *Re Worcester Corn Exchange Company*. (c)

Judgment reserved.

* 32 * THE LORD JUSTICE KNIGHT BRUCE. — The main question in this case is as to the right of the respondents, being some of the directors and other shareholders of a joint-stock company (the subject of an order under the Acts called the Winding-up Acts), to be allowed against the company certain sums advanced by the respondents on the account and for the purposes of the company. An able and experienced Master, Mr. TINNEY, having

(a) 1 Ves. & B. 154. (b) Jac. 284. (c) 3 De G., M. & G. 180.

after much consideration decided it in the respondents' favour, the decision is disputed by the present appeal.

The company was not incorporated, and was an English partnership established in London for the purpose of working mines in Germany. The partners, that is to say the shareholders, were numerous. The mode of administering the affairs of the company was regulated, or professed to be regulated, by a deed, a copy of which I have read. The managing partners under the deed were certain gentlemen called directors.

The mines (German mines, as I have said) were worked under the immediate care and superintendence of a local agent, appointed and sent thither for the purpose by the directors, with whom he corresponded. The undertaking was unprosperous; difficulties and embarrassments arose. The agent was not furnished, or was scantily and irregularly furnished, with the means of paying his way. Such resources of the company as were at the command of the directors were exhausted, and, in order to prevent the property from being seized by the creditors of the mine, and the whole undertaking from being absolutely and finally destroyed and ruined, it became necessary that funds should be supplied to the agent from some other source. This was done by means of the advances in question, which the appellants say * ought, as between the company and the respondents, not to * 33 be allowed to them, but must be lost to the respondents, except, perhaps, so far as the actual property (if any) of the company may be available to pay them.

Now, on what ground is this? Not suppression or concealment, not misrepresentation, not fraud or unfair dealing, not bad faith of any kind, on the part of the directors or any of them, or on the part of any of those who made the advances, or on the part of the company's agent; for if any such imputation is directly or indirectly made (which I do not say), there is certainly no foundation for it in the evidence. But the appellants say that, as the whole of the capital which the shareholders had agreed to contribute had been exhausted before any part of the advances in dispute was made, and as the mines were in an unsatisfactory and unpromising state, it was not only beyond the directors' powers (as between them and the other shareholders), but, independently of that consideration, was indiscreet and highly imprudent on the directors' part, to continue working the mines as they did, and to cause or

sanction the expenditure to which, or for the purposes of which, the advances were applied.

It appears to me, however, that from the evidence before us we may and ought to infer these nine propositions of fact to be true :

1. That the conduct of the directors — the managing partners, namely, of the partnership — was uniformly direct, open, and fair, and the result of good intention.

2. That not on their part only, but on the part of all the shareholders, by whom respectively the advances in question were * 34 made, they were made *bonâ fide* and * honestly with a view to the support and preservation of the undertaking, and under the impression that it was for the benefit of all the partners in it, as such, that the advances should so be made.

3. That the advances were required, made, intended, and applied, not for the purpose of changing the nature of the partnership undertaking, or enlarging or extending it, but for carrying it on, without change, enlargement, or extension, or for saving it from destruction.

4. That the manner in which the amount of the advances was, in fact, applied by the directors and the local agent, would have been in due course, and proper and binding on all the partners, if that amount had not been procured as it was, but had been part of the regular and proper capital of the partnership under the administration of the directors.

5. That unless this amount had been obtained in some manner, and applied as it was applied, there must have been loss and destruction of the whole or an important part of the partnership property in Germany, so as to cause the immediate stoppage and actual ruin of the concern.

6. That it is not proved, not suggested, and not likely, that the shareholders were not justly and lawfully liable to be sued personally here, or, if in Germany, then in Germany, for payment for the work, labour, and materials, for which these advances paid, and which are shown to have been work, labour, and materials, to the payment for which the partnership property in Germany was specifically liable, and summarily applicable by the local law.

7. That the conduct of the directors, in all points material to be considered on this occasion, was such as might well have been the conduct of reasonable men, acting with due consideration and attention in their own affairs.

* 8. That they made the state of the concern, and particularly its exigencies and the pecuniary pressure existing, known to all the shareholders, or to as many of them as was reasonably possible, and did this with reasonable diligence. * 35

And 9. That none of the shareholders took any proceeding or course for dissolving the company, or preventing further expenditure on the mines by the directors.

Supposing these things to be so, I am unable to persuade myself that (either from the restricted amount of the partnership capital, provided by the partnership deed or otherwise) the shareholders who made these advances are not entitled to stand as creditors for them in account against the company, of which they are a portion. I think that the directors, in the circumstances of the case, had a right to do what they did. I do not say that they had a right or power to borrow money from a stranger, so as to make that stranger a creditor of the company. I do not therefore say that the action in *Ricketts v. Bennett*, (a) or that in *Burmester v. Norris*, (b) ought to have succeeded. Here the advances have been made by partners alone, and that with the assent and sanction and at the request of the managing partners, who applied the money as I have stated.

I think that the Master was right as to the entire amount of the advances in question, of which, in what has been said by me, I have assumed every part to have been remitted to Germany and applied there. In fact, however, the matter stands, as to a portion of the dispute, in a manner more clearly unfavourable to the appellants; for some of the money was, in truth, remaining * here at the time of the order for winding up the company, * 36 and has been actually possessed by the official manager, as I understand.

But there remains the question of interest. As to this I have doubted. Without, however, relying merely on Lord HARDWICKE's authority, as for instance on *Omychund v. Barker* (c) and *Barwell v. Parker*, (d) I think that mercantile usage and the general course of trade dealings do, where a partner in a trade has duly and properly advanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, raise an implied contract for

(a) 4 C. & B. 686.

(b) 6 Exch. 796.

(c) 1 Atk. 21; 2 Eq. Ab. 397.

(d) 2 Ves. Sen. 364.

interest, so as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorized, and may not have known of the transaction, at least in the absence of any express contract to the contrary.

The learned Master's conclusion, therefore, which perhaps might have well been more favourable to the respondents, seems to me not less favourable to the appellants than justice and equity required; and the appeal ought, I conceive, to be dismissed with costs. I may add as to the case of the *Worcester Corn Exchange Company*, (a) mentioned by *Mr. Drewry* after the close of the argument, a case which related to an association formed only for the purpose of a particular and limited speculation in building, that it is in my opinion materially distinguishable from the present. I consider that both may well stand together.

* 37 * THE LORD JUSTICE TURNER. — The question raised by this motion is in substance this, — whether moneys advanced by several of the shareholders in this company for the purpose of being applied, and which were in fact applied, in payment of debts and expenses contracted and incurred in the ordinary course of carrying on the mines, and necessarily so contracted and incurred, if the carrying on the mines was justifiable, ought to be allowed to the shareholders who made the advances, in account with the other members of the company.

The motion is, in form, to discharge an order made by the Master under which the advances in question have been allowed to these shareholders, with interest, against a call made upon the general body of shareholders in the company; but, as I understand the case, there is no other question than that which I have already stated.

It having been admitted at the bar that, assuming the carrying on the mines to have been justifiable, the debts and expenses which were paid by means of the advances of these shareholders were necessarily contracted and incurred, it is unnecessary to enter at any length into the facts of the case. The short statement of them, so far as is necessary to explain my opinion upon the question before us, is, that the company was formed in the year 1836

(a) 3 De G., M. & G. 180.

for working some mines acquired and to be acquired in Prussia and Bavaria. That by the company's deed of constitution which was dated the 2d of May, 1836 — [his Lordship read the material parts of the deed]. That in pursuance of the provisions of the deed several mines were set in work, and agents were sent out to Germany and employed in the conduct and management * of the mines. That the original capital of 50,000*l.* was * 38 found insufficient to carry on the concern. That new shares were accordingly created, but that the capital raised by the creation of them was still insufficient. That in consequence of the insufficiency of the funds, the wages of the miners fell into arrear and debts were contracted. That proceedings were threatened, and in several instances commenced, by the miners and creditors, in the Mining Courts of Germany, against the mines. That under such proceedings the mines became liable to seizure and sale upon default of payment within a very limited period. That pressing letters were written by the agents to the directors for supplies of money to meet the demands. That the directors then applied to the shareholders to make contributions for the purpose, and that it was in consequence of these applications the advances in question were made. These were in substance the facts on which the question in this case must in my opinion be decided.

It was contended on the part of the appellants that the advances ought not to be allowed, upon the broad and general ground that the directors had not by the deed any power to borrow money for the purposes of the company. The appellants insisted that the concern was to be carried on with the capital of 50,000*l.* mentioned in the deed, and such further capital as might be raised under the powers for that purpose given by the deed; and that the shareholders of the company could in no case be made liable beyond the amount of such capital. They relied in aid of their argument upon the fact that these advances were made at interest, and to be repaid out of the first assets of the company, and they insisted that the mines ought long since to have been discontinued.

* It may be convenient in the first place to dispose of the * 39 points thus brought forward by the appellants in aid of their general argument, and this part of the case does not appear to me to be open to much difficulty. With respect to the terms on which the moneys were advanced, it is to be observed that they were

advanced to the company, and not to any of the directors individually. If the directors had power to bind the company by their contracts for the advances, no question arises; but if the directors had not that power, still the moneys were applied for the benefit of the company, and any right which there may be arising from such application cannot, as I conceive, be affected by the circumstance of the directors having entered into a contract, which it was beyond their power to make; and with respect to the mines having been continued, the deed vests in the directors the whole management of the affairs and concerns of the company, and, upon the evidence in this case, I think it must be taken that the mines have been continued, not for the purpose of continuing and carrying on the business of the company, but with a view to a more advantageous sale of the mines being ultimately effected; and, if the directors in the *bonâ fide* exercise of their discretion, and their *bona fides* is not questioned, thought proper to continue the mines for this purpose, I see no ground on which the appellants can found any objection upon the ground of the mines having been so continued. The case, therefore, must, in my opinion, depend upon the broad and general positions on which the appellants relied.

The appellants' argument upon this point rested mainly upon several cases which have been determined at law, *Burmester* * 40 *v. Norris*, (a) *Ricketts v. Bennett*, (b), and * the cases there cited. Those cases seem to me fully to establish this position, that the acting manager of a mine, whether he be a shareholder in the mine or not, has no power to render his co-shareholders liable for money borrowed, although it may be borrowed for the necessary purpose of carrying on or even of preserving the mine; and the appellants, adopting this position, contended that the distinction between moneys borrowed and debts contracted was too narrow and refined to be acted upon by the Courts. But this distinction seems to me to be established and to rest upon sound principles.

The distinction is well marked in the cases upon the Trewolvas mine. In one of those cases, *Hawtayne v. Bourne* (c), it was held that the shareholders were not liable for moneys borrowed by the agent in order to pay the arrears of the wages due to the labourers in the mine; but in another of those cases, *Hawken v. Bourne*, (d)

(a) 6 Exch. 796.

(c) 7 M. & W. 595.

(b) 4 C. B. 686.

(d) 8 M. & W. 703.

it was held that a shareholder was liable for goods supplied for the necessary working of the mine on the order of the resident agent. What is the distinguishing principle between these cases? I take it to be this. It is not according to the usual course of business for the manager of a mine to borrow moneys for the purpose of carrying on the mine, and therefore where money is lent to the manager of a mine, the party lending it must look to the power of borrowing with which the manager is invested, and can recover over against the parties who have authorized the borrowing of the money; but, on the other hand, wages must become due to the miners, and goods must be bought upon credit by the manager of a mine, and the shareholders therefore are considered to have authorized the manager to incur such expenses and contract such debts, and consequently are held liable * for such ex- * 41 penses and debts. Surely this distinction is sound in principle. To hold the shareholders liable for moneys borrowed by the manager without their authority would be unjust, for then they would be liable whether the moneys borrowed were expended upon the mine or not; but there is not the same injustice in holding them liable for wages incurred, and debts contracted for the purposes of the mine, for then they have the benefit of the expenditure.

Applying these decisions and these principles to the present cases, I think that the shareholders by whom these advances were made, would, in common with the other shareholders, have been liable to the miners and creditors, who were paid by means of the advances, and therefore that (assuming the mines to have been properly carried on, upon which I have already observed and shall presently observe more fully, and assuming the expenditure to have been properly incurred, which upon the footing of the mines being carried on is not disputed), the decision of the Master ought to be upheld upon that ground alone.

But there is another ground on which, also, I think the Master's decision ought to be upheld. These companies are in truth no more than partnerships composed of a large number of partners, and the same principles which apply to partnerships limited in number apply to these companies also, except so far as the nature of the undertaking or the number of the partners may render necessary a modification of those principles. Now, in ordinary partnerships, the partners must bear the losses in proportion to

- their interests. Does, then, the nature of this undertaking or the number of the partners engaged in it render it necessary to introduce any modification of this rule? For the reasons
- * 42 already given, I think that * so far as respects expenses and debts of this nature, no such modification is required by the nature of the undertaking. All the partners are liable for such expenses and debts. What then is the effect of the number of the partners? Is it not simply this, — that the company must act by directors, who stand in the position of trustees? So far as there is any breach of trust on their part, no doubt the loss must fall upon them; but, so far as they cannot be saddled with the loss, what is to alter the general rule as to the liability of the partners *inter se*? I see nothing which can have that effect. That the directors in this case could not be charged for having continued the mines, I have already expressed my opinion; and if they could not be charged individually, I think the expenses incurred must fall upon the shareholders generally.

It was said that this was a concern with a limited capital, and that the directors could not be justified in expenditure beyond the capital; but this deed must be construed like other partnership deeds. In all such cases the capital is limited, but the engagements of the partnership cannot be measured by the extent of the capital. New undertakings were not indeed to be entered into after the full capital had been embarked, nor is it suggested that any such were entered into, but how was the expenditure upon the existing undertakings to be measured by the extent of the capital? Was the concern to be stopped at the moment when the expenditure equalled the capital, and how in a concern of this nature was it to be ascertained when that moment had arrived?

I think, therefore, that the decision of the Master ought to be upheld upon this second ground if it was necessary to resort to it.

- * 43 * After the argument was concluded, we were referred to the case of *The Worcester Corn Exchange Company*, (a) but that case appears to me to be wholly different from the present. In that case a particular sum was subscribed for the purpose of being expended upon a particular building. There was no trade to be carried on requiring continued expenditure; and, besides,

(a) 3 De G., M. & G. 180.

the liabilities beyond the subscribed capital arose principally if not wholly from moneys borrowed by the directors, which they had no power to borrow. They were the parties seeking the contribution, and the necessity for that contribution arose from their own breach of duty. That case, therefore, does not, in my opinion, at all govern the present.

In the course of the argument in this case, a question arose as to the interest upon these advances. I have felt more difficulty upon that part of the case than has been felt by my learned brother; but, as his opinion decides the question in favour of the allowance, I have not thought it necessary that we should suspend our judgment upon the point. It is right, however, to add, that the further consideration which I have given to the point since it was argued, has very much inclined me to think that, under the special circumstances of this case, the interest ought to be allowed, although I have been unable to find reasons which are altogether satisfactory to my mind upon the question, and I should hesitate to lay down any general rule upon the subject.

After this decision, the directors and shareholders who had guaranteed the London and Westminster Bank the repayment of the advances, amounting to 12,217*l.* 5*s.* * discharged * 44 the amount in pursuance of their guarantee. They then claimed, before the Master, to be allowed the amount so paid by them as a set-off against the call, in addition to the sums which, under the above decision, they were entitled so to set off. Evidence was adduced to show that the moneys raised by the directors and shareholders on their guarantee to the bank had been applied in properly carrying on the business of the mine.

The Master allowed the claim, and his decision was affirmed on appeal by Vice-Chancellor STUART, on the 23d February, 1854.

Against these decisions, the same contributories appealed who appealed upon the former occasion.

1854. May 11, 25. June 23.

Mr. Malins, Mr. Cowling, and Mr. Drewry, in support of the appeal. — This is altogether a different question from that on which the Court decided in May last. There the advances were made by shareholders, and for the purpose of paying off debts of the company, for which the company and its members were liable to

be sued. Here the advance was made by strangers, not to pay any debt, but to carry on a concern which, in ordinary prudence, ought to have been discontinued, and which the shareholders had determined on discontinuing. As the banking company had no claim against the company, the respondents could acquire none by discharging the demand. If the money borrowed had been ever so well applied, still it has been decided that it could constitute no debt from the company, and could not have been recovered against any shareholder other than the borrowers. The Court of Exchequer has decided that the borrowing was not a partnership transaction as between the company and the world at large, and if so a * 45 *fortiori* it could * be no partnership transaction as among the partners themselves.

The directors have paid the bank in their own wrong, and can have no claim by reason of the payment against the shareholders, and, having exceeded their powers, nothing would bind the shareholders except the universal consent of every one of them. *Morgan's Case*. (a) A joint-stock company differs from an ordinary partnership in many respects. *Bramah v. Roberts*. (b) In an ordinary partnership, each partner practically takes a share in the management of the concern. In a company that is impossible. Certain powers are therefore given to some of the body by the articles, and by these provisions their powers are defined and limited. They are trustees, and cannot exceed the limits of their trust. Like the executors of a tradesman, they cannot apply their own moneys in carrying on the concern without authority.

[THE LORD JUSTICE TURNER. — Suppose, in the case which you suggest, it is necessary to obtain an advance to complete certain works, is not the executor justified in obtaining it? His Lordship referred to *Buxton v. Buxton*. (c)]

The executor could not properly raise money to carry on the concern if it was in an insolvent state. An executor in such a case could not prudently act except under the direction of this Court. In this case, as in that of a club, which was put on the former appeal, but which is much more closely applicable to the

(a) 1 M. & G. 225. (b) 3 Bing. N. C. 963. (c) 1 M. & Cr. 80.

present, the directors were supplied with the moneys which they had power to expend, and ought not to have exceeded them. *Todd v. Emly*, (a) *Fleming v. Hector*. (b) In *Bank of Australasia v. Breillat*, (c) * the power to borrow was inci- * 46 dental to the trade, which was that of a banker. The appellant's case here is stronger than it was upon the direct claim of the London and Westminster Banking Company; for that case was open to the argument that the creditors might have presumed the directors to have had the power of borrowing, whereas the directors themselves, who now make the claim, knew that they had no such power. The directors could not make engagements beyond the 50,000*l.* subscribed.

No case of acquiescence is established on the part of the shareholders. One of the appellants expressly signified his disapprobation of the continuance of the concern. The law provides the means of summoning special meetings, and if the directors chose without doing so to act upon their own responsibility, they must abide by the consequences of such a proceeding.

They also referred to *Re Worcester Corn Exchange Company*, (d) *Prendergast v. Turton*, (e) *Powles v. Page*, (g) *Davies v. Hawkins*, (h) *Smith v. Goldsworthy*, (i) and Sir F. KELLY's argument in that case, (k) *Hawtayne v. Bourne*, (l) *Tredwen v. Bourne*, (m) *Ricketts v. Bennett*, (n) *Brown v. Byers*, (o) *Hallett v. Dowdall*. (p)

The Solicitor-General and *Mr. Greene*, for the respondents. — The question is altogether different from *Burmester v. Norris*. This is not a question between the shareholders * 47 and creditors, but between the shareholders themselves, as it was upon the former appeal, the judgments upon which apply to the present. It has never been held that the engagements into which a partnership may enter are limited by the amount of its

(a) 7 M. & W. 427.

(b) 2 M. & W. 172.

(c) 6 Moore, P. C. 152.

(d) 3 De G., M. & G. 180.

(e) 1 Y. & C. C. C. 98.

(g) 3 C. B. 16.

(h) 3 M. & S. 488.

(i) 4 Q. B. 430.

(k) 4 Q. B. 463.

(l) 7 M. & W. 595.

(m) 6 M. & W. 461.

(n) 4 C. B. 686.

(o) 16 M. & W. 252.

(p) 21 Law J. N. S., Q. B. 98.

subscribed capital. No case can be found in which such a proposition is laid down. The confusion in the argument on the other side arises from the attempt to draw a distinction between the directors and the other partners. The only difference is, that they are active and the other partners dormant partners. By the management clauses, the directors have the powers which, but for those clauses, all the partners would have. How can it be told at what time the capital is expended? Capital may exist, although not in the shape of money. And with regard to mining concerns, it is important to recollect what Lord ELDON said in *Norway v. Rowe*. (a) His Lordship there said: "Consider the nature of such a concern. It frequently remains for years in the most hopeless state; and may at last be rendered profitable by an adventurous speculator, embarking property of his own and others in the pursuit. The speculation is very hazardous: perhaps, when you have a golden prospect, the whole may fail. I have known a copper mine producing 20,000*l.* a year, and the next week worth nothing; and that is as true of coal mines. There are persons who will stand by; see the expenditure incurred; if it turns out profitable, set up their claim; if otherwise, have nothing to do with it. It deserves great consideration, whether the Court would interpose even by decree, much less on motion."

* 48 In a mining concern the capital exists in the adits * that are driven and in the plant and machinery erected.

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose there was a firm of tallow merchants whose capital was agreed to be 25,000*l.*, and an opportunity occurred for the managing partners to invest, on advantageous terms, 30,000*l.* in a purchase of tallow. Would that be *ultra vires*?]

It has never been so held. It is a mistake to say that partners are agents for one another, and then to apply to them all the incidents and restrictions belonging to the relation of principal and agent. Directors are not merely the agents of the other partners, in the proper sense of the word, — they are managing partners, and have all the powers of partners. You must find a prohibitory clause in the deed, and show that it has been acted upon, before you can

(a) 19 Ves. 144.

exclude these powers, and before you can prevent a partner from engaging in a transaction within the scope of the partnership business, merely because it may possibly involve a loss beyond the amount of the capital agreed upon.

[THE LORD JUSTICE KNIGHT BRUCE. — Your argument is, that although a partner cannot be compelled to advance more than the stipulated amount of capital, he may be made liable beyond that amount as between himself and his partners.]

There is no inconsistency in the propositions. Suppose there was an agreement to trade between London and Mauritius, and the managers enlarged the area, and a debt was thus incurred, they might not be entitled to charge the firm with the loss. But how does that observation apply to a debt incurred in carrying on business entirely within the scope of the partnership business, without extension or change? We only ask that the directors may be held to have the same discretion as in managing a business of their own. In the absence of any stipulation to the contrary, the directors, as being persons in a fiduciary position, are entitled to be indemnified against any loss in so conducting the affairs * of their fiduciaries. Necessity is too narrow a criterion by * 49 which to measure, in a Court of Equity, the exercise of such discretionary powers as the directors are intrusted with. It is enough if, according to a fair judgment, the proceeding in question would be proper in the conduct of their own affairs. The agreement that the mine should be carried on is not consistent with a positive stipulation that a certain sum only should be expended. Suppose a firm of contractors, with an agreed-upon capital, undertook a contract, and before its completion the price of iron or of some other commodity involved in the contract increased so much that it could not be performed without more capital, could not one of the firm make the required advance?

Mr. Malins, in reply.

Judgment reserved.

June 23.

THE LORD JUSTICE TURNER. — The question for our consideration in this case is, whether several sums of money paid by several of

the contributories of the company, under the circumstances which I shall presently state, ought to be allowed to them in account with the company. The Master was of opinion that the allowance ought to be made, and certified accordingly; and the Vice-Chancellor Sir JOHN STUART refused to disturb the certificate. The case comes before us upon appeal from the Vice-Chancellor's decision.

The company was formed in the year 1836, under a deed dated the 2d of May in that year. I shall have occasion hereafter * 50 to refer more particularly to the provisions * of the deed, but it is sufficient at present to state that the objects of the company, as defined by the deed, were to work some mines in Germany which had been already acquired, and others, the acquisition of which was contemplated, and to dispose of the ores and other produce of the mines; and that the deed provided that the capital of the company should consist of the sum of 50,000*l.*, divided into 100 shares; but that it contained provisions for the creation of new shares.

It appears that the capital of the company was found to be insufficient to carry out its objects, and that further capital was raised by the creation of new shares under the provisions of the deed. That the further capital was also found to be insufficient, and the company became indebted to its bankers. That on the 23d of August, 1843, several of the directors and shareholders of the company joined in a guarantee to the bankers for 3962*l.* 19*s.* then due to them, and for further advances to be made, and which were afterwards made by them to an amount not exceeding in the whole 5000*l.* That on the 18th of November, 1846, and the 6th of January, 1847, further sums of 1200*l.* and 4200*l.* were borrowed of the bankers on the like guarantees of directors and shareholders. That the contributories whose case is under consideration, one of whom was a shareholder only, and the others directors of the company, joined in these guarantees. That the moneys thus borrowed of the bankers were expended in carrying on the business of the company in its ordinary course. That an order having been obtained to wind up the company, the bankers claimed to be creditors of the company for the moneys advanced by them. That the question of the liability of the company to the bankers was referred to a Court of Law for its decision, and * 51 that it was decided at * law that the company were not

liable to the bankers. That under these circumstances these contributories have been called upon to pay, and have paid the amount due to the bankers. It is the amount thus paid to the bankers which forms the subject of the present appeal.

The affairs of this company have already been under our consideration, with reference to a question as to the right of the directors to be allowed some sums of money which, on that occasion, were understood to have been expended by them in carrying on the business of the company, with a view to prevent loss in winding it up, and we were of opinion that the moneys so expended ought to be allowed. It was stated at the bar, upon the argument of this appeal, that the whole or parts of the sums now in question stand upon the same footing as part of the sums formerly allowed, but I consider this to be of no importance; for if we were satisfied that our former judgment was erroneous, we certainly should not be disposed to persevere in the error.

The question before us in this case was mainly argued on the part of the appellants, upon the ground that, according to numerous decisions at law, which were cited in the argument, the directors of companies are in the position of agents. Their powers are derived from and limited by the deeds under which they are appointed; and acts done by them beyond the limits of their powers do not bind the companies of which they are directors; and it was insisted on the appellants' behalf that, it having been established at law that this company was not liable to the bankers for the moneys advanced by them, it followed as a necessary consequence, that the respondents could not be entitled to be repaid by the company the moneys which they had paid, in discharge * of the amount due to the bankers; but although * 52 directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees;¹ and all trustees are entitled to be indemnified against expenses *bonâ fide* incurred by them in the due execution of their trust. There is no inconsistency in this double view of the position of directors. They are agents, and cannot bind their companies beyond their powers. They are trustees, and are entitled to be indemnified for expenses incurred by them within the limits of their trust.

¹ See *Kelley v. Greenleaf*, 3 Story, 93, 101.

If therefore it appears that moneys advanced by the directors of companies have been duly applied for the purposes of the trust reposed in them (and it can make no difference whether the moneys were originally advanced, or were in the first instance borrowed, and afterwards repaid by them), it may well be, that they may be entitled to be repaid by their companies the moneys which they have so advanced, although the persons from whom they have borrowed for the purpose of making the advance may not be entitled to recover against the companies. The question in the one case depends upon the powers of the directors; in the other, upon the rights incident to the character which they fill. What those rights may be, must depend in each case upon the deeds by which they are appointed; for, no doubt, a company's deed, or any other deed, may be so framed as to deprive directors or trustees of the right to indemnity, and, if parties think proper to accept directorships or trusts under deeds so framed, they must abide by the consequences; but the right of indemnity is incident to the position of a trustee, and if it is sought to exclude that right, the provisions for that purpose must, as I apprehend, be clearly expressed.

* 53 * The question, therefore, which, in my view of this case, we have to consider is, whether the provisions of this company's deed exclude the right of the directors to be indemnified in respect of the advances made by them. It was argued on the part of the appellants, that the right was excluded, because the capital of the company was limited to 50,000*l.*, and no call could be made beyond that amount; except in respect of further capital raised according to the provisions of the deed; from which circumstances this conclusion was deduced, that it was the duty of the directors so to conduct the concern, as that a sufficient portion of the capital should always remain in hand to meet the expenses. But in the first place, it was impossible, from the nature of this concern, to foresee what expenses might be incurred or what portion of the capital might be required to meet them; and, in the next place, the provisions of this deed demonstrate that the parties to it looked to the produce of the mines as a fund to meet the expenses. The dividend clauses, distinguishing between profits and produce, seem to me to be decisive upon that point. The directors, therefore, could not be bound to conduct the concern upon the strict principle contended for by the appellants, and if they were

entitled to look to the produce of the mines as a fund to meet the expenses, how were the expenses to be met if the produce was at any time insufficient for the purpose, and the directors were not at liberty, as between them and the shareholders, to make any advances for the purpose?

It was attempted to meet this view of the case by a reference to the 33d clause of the deed, under which it was insisted that, in such a state of circumstances, it was incumbent upon the directors to have called a meeting of the shareholders. But I do not think it by any means * clear that the 33d clause of the deed * 54 applies to such a state of circumstances. It seems to me to refer rather to permanent than to temporary arrangements; but, assuming the clause to apply, I think it was in the discretion of the directors whether a meeting should be called, and if, in the *bonâ fide* exercise of their discretion (and their *bona fides* is not questioned), they considered that the advances made by them would establish the company upon a sound footing, and that it was not for the interest of the company that a general meeting should be called, I do not think it was incumbent upon them to call such a meeting, or that their having neglected to do so can be made the ground either of charging them or of depriving them of any benefit to which they would otherwise be entitled. Directors, acting *bonâ fide*, cannot, as I conceive, be charged for a mere error in judgment; at all events, when a discretion is in terms reposed in them. It may further be observed, on this part of the case, that the shareholders, who were apprised by the reports of moneys having been advanced by the bankers, might, if they had thought fit to do so, have themselves called a meeting to dissolve the company.

It was strongly urged by the appellants' counsel that, whatever might be the right of the directors to indemnity against the property of the company, they could have no such right against the shareholders personally; that the liability of the shareholders was limited to their respective shares of the 50,000*l*. But I think that, where parties place others in the position of trustees for them, they are in equity personally bound to indemnify them against the consequences resulting from that position. I may refer to the case of *Balsh v. Hyhan*, (a) as a strong authority in support of that position.

(a) 2 P. Wms. 453.

* 55 * In that case it appears that the plaintiff was a trustee for the defendant of the sum of 1000*l.* South Sea stock, and at his desire borrowed of the company 4000*l.* on a mortgage of the stock, and the defendant, the *cestui que trust*, received the money borrowed, and afterwards the Act of Parliament was made, which provided that if any of the borrowers would pay to the company 10*l.* per cent before such a day, they should be discharged of the rest of the money borrowed. The defendant, the *cestui que trust*, thought that he was entitled, notwithstanding that provision of the Act, to leave the company to take the stock, and that he was not liable to pay the 10*l.* per cent to the company in discharge of the lien, and he gave notice to the trustee not to pay the 10*l.* per cent. The trustee, however, did pay the 10*l.* per cent, and then he filed a bill against the *cestui que trust*, to compel him personally to repay, there being of course no trust funds in his hands to which he could resort for the repayment. The Lord Chancellor said: "If the defendant had not only forbid the payment of this 10*l.* per cent, but had also offered security to indemnify the trustee in respect of it, this had been material, had the plaintiff afterwards paid the 10*l.* per cent. But the plaintiff had good reason to think that he was liable to pay the whole money borrowed." Afterwards he goes on to say: "If a mortgagor borrows money, though there be no covenant in the mortgage-deed to pay it, yet his executor has been decreed to pay the money in discharge of the land descended to the heir; but if in the present case there was only a hazard, the trustee ought not to continue liable to such hazard; on the contrary, as it is a rule that the *cestui que trust* ought to save the trustee harmless, as to all damages relating to the trust, so, within the reason of that rule, where the

* 56 plaintiff, the trustee, has honestly and fairly, * without any possibility of being a gainer, laid down money by which the defendant, the *cestui que trust*, is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, the plaintiff ought to be repaid. Therefore let the defendant pay to the plaintiff the 10*l.* per cent paid by the plaintiff to the company with interest and costs."

With respect to the liability of the shareholders being limited to their shares of the 50,000*l.*, I think that is a circumstance to be considered (as I have already considered it) with reference to the question whether the right to indemnity exists, and that, it

being established that the right exists, the law supplies the remedy.

I have treated the case throughout as if all the respondents were directors. One of them, I observe, was a shareholder only ; but I do not think that this varies the case. My opinion is, that this motion must be refused, with costs.

THE LORD JUSTICE KNIGHT BRUCE. — In May, 1853, when this Court disposed of a controversy between the parties now before us, or some of them (that has been mentioned more than once during the argument on the present appeal), I represented myself as considering certain propositions of fact to be established and true. I stated them then particularly, and the counsel in this case being aware of them, their repetition is needless. I adhere to them, not merely with reference to the former contention, but with reference also to the whole subject of that now before us, and for the purpose of the present appeal. Supposing that thus far I am right, it must, I think, follow that * the Master has come to * 57 a correct conclusion on each occasion, — now as well as before.

The appellants' argument has been mainly or wholly based on the language of the deed constituting the German Mining Company, so far as relates to the capital of the company and to "calls ;" language, however, which — taken especially, as it must be, in connection with the rest of the deed — does not, I think, require or admit of the appellants' construction, nor can, in my opinion, be properly attended by the consequences ascribed by them to it. And this not by any means the less, because, as they desire us to understand the deed, it was one under which not any honest man of ordinary prudence would, I conceive, have submitted to be a director, one (as it seems to me) not reasonably consistent with the nature of the adventure, — with the kind of business which the company was formed for carrying on.

Dissenting from the appellants' exposition of the instrument, and their view of its consequences, I must hold that the present motion ought to be refused, and, considering what the Vice-Chancellor did as to the costs before him, they ought, I think, to pay the costs here.

1853. April 23. May 25. Before the LORDS JUSTICES.

A testator directed that the interest and dividends of the remainder of his stock should be invested so as to accumulate until the end of twenty-one years from his death, when the whole was to be disposed of towards his then nearest of kin in the male line in preference to the female line: *Held*, that the son of the testator's paternal uncle was not entitled, in preference to the testator's sister.

THIS was an appeal from the decision of Vice-Chancellor Wood (reported in the 10th volume of Mr. Hare's Reports, page 389), upon the construction of a codicil to the will of Admiral Sayer.

The will and codicil are set out in Mr. Hare's report. The following portions of them are sufficient to explain the questions disposed of upon the appeal. By the will the testator directed thus:—

“At the death of the last survivor of my nephews and nieces, whether born before or after my death, the capital sum which, at the death of the last survivor of them, may be standing in virtue of this my will in the books of the Bank of England, shall become the property of the then nearest of kin to myself in the male line, in preference to the female line, upon the condition of the inheritor thereof assuming the surname of “Sayer” only, if not of that surname; and that such inheritor of the said capital sum shall bear and use, according to the law in such case enacted, the arms, with the differences which may have been at any time previous to my death assigned to me. In default whereof the next in lawful succession, and successively the heir or successor, who shall legally comply with these conditions in respect to the surname and the arms, shall become entitled to the said capital sum. Provided, nevertheless, that no inheritor of the same shall become entitled thereto, or be * put in possession thereof, until the party shall have attained the age of twenty-one years.”

* 59

And by the codicil thus:—

“And I now direct that the interest and dividends of all the

¹ S. C., 10 Hare, 389; *nom.* Sayer v. Bradly, 5 H. L. Cas. 873.

remainder of my stock over and above the interest of 10,000*l.* three per cent annuities shall be invested half-yearly as it becomes payable from time to time, and in like manner the interest and dividends of the invested interest in the three per cent annuities, in order that the same shall accumulate until the expiration of twenty-one years from and after my decease; at the termination of which period of twenty-one years, the whole capital sum then standing in the books of the Bank of England, in virtue of my will, and this a codicil thereto, shall remain to be disposed of towards my then nearest of kin in the male line, in preference to the female line, under the conditions and restrictions as in my said will are set forth by me, the said inheritor first paying therefrom the interest of 10,000*l.* three per cent stock to the survivors of my brothers, sisters, nephews, and nieces, until the death of the last survivor of them in the proportions prescribed by my will in their behalf and in behalf of their children (if any) until the death of the said last survivor."

At the foot of this codicil the testator wrote a memorandum directing his gold medal of Java, his Clarence medal, his seals, a gold snuffbox presented to him by the King of the Netherlands, his ancient china and pictures, especially of his great-uncle and his wife, his silver staff, naval histories, and Thorne's Capture of Java, to be preserved by them, to descend with the patent and painting of his armorial bearings to the "inheritor" thereafter of his capital property, and to the descendants who might from time to time succeed thereto.

* At the respective times of the dates of the will and codicil, and of the testator's death, he had two brothers, Benjamin Sayer and Charles Sayer, and six sisters, Judith Innes, Elizabeth Boys, Mary Sayer, Susanna Sayer, Caroline Sayer, and Jane Bradley. * 60

At the expiration of twenty-one years from the testator's death there were living,—Mrs. Bradley, one son and four daughters of Mrs. Bradley, three sons and one daughter of Mrs. Boys, and Captain Sayer, a son of a brother of the testator's father.

Both the testator's brothers had died bachelors. Mrs. Innes had died without having had a child; Mrs. Boys, leaving those above mentioned; and Mary Sayer, Susanna Sayer, and Caroline Sayer, without having been married.

Captain Sayer claimed to be entitled to the trust fund as the nearest of kin in the male line in preference to the female line. The son of Mrs. Bradley and those of Mrs. Boys claimed on the other hand to be the persons who answered that description. Mrs. Bradley herself claimed as being the nearest of kin in the male line. The trustees instituted the suit to have these claims disposed of by the decree of the Court.

The Vice-Chancellor held that Mrs. Bradley was entitled to the fund, and this was the appeal of Captain Sayer from the Vice-Chancellor's decision.

Mr. Russell and Mr. E. G. White, for the trustees.

Sir Fitzroy Kelly, Mr. Chandless, and Mr. Surrage, for Captain Sayer. — Captain Sayer is entitled as pure lineal heir male.

* 61 * All the expressions in the will point to one person as the "inheritor," and indicate the testator's intention that one person should inherit and transmit his property, family name, and arms; they show that he did not intend a class of persons to take his name and divide his heirlooms. Now, by no other interpretation than that of heir male could the gift have centred in one person, and this interpretation accords with the subsequent expressions "inheritor," "heir," "successor," "descendants." In the Court below it was argued that as the lineal heir male would necessarily be of the testator's name, the provision for taking his name would have been superfluous upon the construction for which we are contending; but the answer is that the bequest is so given only "in preference to the female line." On an entire exhaustion of the male line, the female line was to succeed, and then the provision would operate. Moreover, the testator had made provisions for his brothers and sisters and their descendants for their lives out of a part of the fund, and had thereby shown that he meant some inheritor not of their class. The bequests in favour of his married sisters were settled for their separate use, and it is not probable that the testator intended the husband of a daughter to take the capital, when he had expressly excluded him from taking any part of the income. The testator used the word "male line" in its ordinary signification. In ordinary parlance we say, that on the accession of her present Majesty the crown passed away from the male line of the house of Hanover.

The Solicitor-General and *Mr. Giffard* were for Mrs. Bradley.

Mr. Rolt, *Mr. Glasse*, *Mr. Follett*, *Mr. R. Pryor*, *Mr. Dickinson*, and *Mr. C. Hall* appeared for the other respondents.

* The following cases were cited: *Blackborough* v. * 62 *Davis*, (a) *Pyot* v. *Pyot*, (b) *Oddie* v. *Woodford*, (c) *Bernal* v. *Bernal*, (d) *Withey* v. *Mangles*, (e) *Thomason* v. *Moses*, (g) *Leigh* v. *Leigh*, (h) *Doe* v. *Fleming*, (i) *Craik* v. *Lamb*, (k) *Doe* v. *Plumptre*, (l) Co. Litt. 31.

Hallam's Middle Ages, Vol. II. p. 474, and Lingard's History of England, Vol. III. p. 107, were also referred to.

May 25.

THE LORD JUSTICE KNIGHT BRUCE. — This appeal raises a question which (to borrow Lord ELLENBOROUGH's expressions in *Fenny* v. *Ewestace* (m) may perhaps seem one for a grammarian rather than a lawyer, or that a schoolmaster might decide as well as a Judge.

The appellant's proposition, strangely as it may sound, is that a woman cannot be so related to a man as that she can properly be said to be of kin to him in the male line, a proposition, however, not intended to draw into controversy the laws of nature, but rather, I repeat, one of philological science. It arises thus: the testator in the cause, Rear-Admiral George Sayer, was an agnatic kinsman of the appellant, who, having been born before the end of the twenty-one years, which I am about to mention, complains of the refusal of the Vice-Chancellor, Sir WILLIAM WOOD, to construe in his favour a passage contained in a codicil to the will of that gallant officer, directing, in effect, the residue of his personal estate to * be accumulated for twenty-one years next * 63 after his death, and at the end of that period giving it to his then nearest of kin in the male line. The very words are these.

(a) 1 P. Wms. 41.

(b) 1 Ves. Sen. 335.

(c) 3 M. & C. 584.

(d) *Ib.* 559.

(e) 4 Beav. 358; 10 Cl. & Fin. 215.

(g) 5 Beav. 77.

(h) 15 Ves. 92.

(i) 2 C. M. & R. 638..

(k) 1 Coll. 489..

(l) 3 B. & A. 474.

(m) 4 M. & S. 58.

[His Lordship read them.]

The context, whether of the codicil alone or of the whole of the testamentary instruments taken together, may, I think, be, without injustice, treated on the present occasion as of no importance, though I agree that the provisions as to the testator's name and arms (if material at all to be considered) may be thought to have a bearing rather against than for the appellant, since we must, I conceive, especially after the case of *Leigh v. Leigh*, (a) ascribe those provisions to the testator's contemplation of the possibility that the person or every person designated to take the capital of his property might not be a male agnate; and, though this is not inconsistent with attributing to him a wish to prefer a male agnate to any other relative, still the circumstance does not assist the appellant.

The facts deserving attention are these: The testator, who seems to have left none but collateral kindred, and died a bachelor, had brothers and sisters, all of the whole blood, who survived him, and were the persons, the only persons, who would, under the Statute of Distributions, have been beneficially entitled to the clear residue of his personal estate if he had died intestate.

Of these brothers and sisters all, except Mrs. Boys and the respondent Mrs. Bradley, who is still alive, died within the term of twenty-one years mentioned in the codicil, without leaving issue. The death of Mrs. Boys happened in 1833. Of this
 * 64 lady there are sons * and a daughter living. Mrs. Bradley also has a son alive, whom I suppose to have been born before the end of the twenty-one years, that term having expired in the course of the year 1852.

The appellant (a kinsman to the testator only as his cousin) is the son of the testator's paternal uncle of the whole blood, and was, I assume, at the end of the twenty-one years, the sole subsisting male issue in a pure male line of the testator's paternal grandfather, so that, if a real estate had been settled on the testator's father in tail male, with remainder to the testator's paternal grandfather in tail male, it would, on the death of the testator's last surviving brother in 1851, have devolved *per formam doni* on the appellant, whom I assume also to be, and at the end of

(a) 15 Ves. 92.

the twenty-one years to have been, the testator's nearest relative, except the issue of the testator's father.

To return to the language of the testamentary dispositions, the term "nearest of kin" is obviously one not necessarily confined to a single person; it may include a plurality. The testator has not used anywhere the word "heirs," or the phrase "male heir." There are indeed to be found once the word "heir" and several times the word "inheritor," but the latter in the sense merely of "taker," and the former in no technical sense. Nor has he said "male nearest of kin," or "nearest of male kin." He has used the word "male" only in conjunction with the word "line." So of the word "female." To remark that he has said "in the male line," not "in a male line," nor "of the male line," is perhaps immaterial. But having made use of the two terms "male line" and "female line," expressing a preference of one line to the other, though not perhaps meaning exclusion, he must have understood * one term as something substantially different from * 65 the other. What did he understand by either? This, as Lord ELDON said in *Boote v. Blundell*, (a) never can be ascertained, the question being what the testator "has authorized the Court to say it is probable was his meaning." "Laborare de verbo" is here "laborare de re."

The expression "female line" is one habitually, I believe, used less strictly than the phrase "male line." The idiom of the English language seems to authorize one to designate all his maternal kindred as his relatives in the female line, whether related to his mother on her father's side or otherwise, but not to authorize an equally free application of the term "male line." When a correct speaker says that one person is related to another in the male line, we understand him to mean that they are the *agnati* of the Roman law, that is, "cognati per virilis sexus personas cognatione conjuncti." A man, therefore, is not necessarily related in the male line to all his father's relatives; and I am not satisfied that, in the present testator's testamentary dispositions, it would, either on the ground that he has used also the term "female line" or otherwise, be safe to construe the words "in the male line" as equivalent to "ex parte paternâ," that is, as importing more than agnation in the strict sense.

(a) 1 Mer. 237.

This view, though not unfavourable to the appellant, does not decide the dispute for him. He has still to establish the proposition that, at the end of the twenty-one years, he was the testator's nearest of kin in the male line, which involves (as I have said) the assertion that a woman cannot be of kin to a man in the male

line, if that term is used strictly; since it is clear that, at
 * 66 the end of the twenty-one years, Mrs. Bradley alone * was the testator's nearest of kin, and, if a woman can strictly be said to be of kin to her father's son in the male line, his nearest of kin in the male line also. But I apprehend that, when one person is, by however exact a speaker, said to be related to another in the male line, this does not necessarily import that each or either is of the male sex, more than if it is said that one person is related to another in the female line, this of necessity means that each or either is a woman.

A man's maternal uncle is related to him in the female line; his paternal aunt not necessarily so. A woman and a man may certainly be agnates to each other; for they may be "*per virilis sexûs personas cognatione conjuncti*," which is being related to each other in the male line in every sense.

The testator was of the house of Sayer, and therefore a Sayer in the male line; so is Mrs. Bradley. Every woman must come of some male stock, and accordingly be of some male line, at least if legitimately born. Mrs. Bradley was legitimately born, but comes of no male line, unless that which was the male line of the testator. A man has two granddaughters, one the daughter of a son, the other of a daughter. He says of them correctly, "One is my granddaughter in the male line, the other not." A lady, having two first cousins not related to each other, one the daughter of a paternal uncle of the whole blood, the other the son of a maternal uncle, may properly describe the former as being, and the other as not being, her cousin-german in the male line. A widower with a daughter marries a woman not related to his former wife, and has a son by the second marriage. If the brother and sister are not of kin to each other in the male line, they are of kin to each other in no line at all.

* 67 * It appears to me that the Vice-Chancellor was right in deciding against the appellant. I lay no stress on the circumstance, that the appellant's construction would, in a possible case, have excluded all the testator's sisters and their issue, male

and female, in favour of a person whose last common ancestor (*communis cognationis auctor*) with the testator was living in the time of the Plantagenets.

But I may observe that, when considering the argument in support of the appeal, it occurred to me to think what, upon the theory of that argument, would have been the devolution of the residue if during the twenty-one years there had been a failure of male agnates. Would it in that event, and on that theory, have gone as upon an intestacy, or, through the words "in preference to the female line," by way of gift to any person or persons? And if so, to whom? And especially to whom, if the issue of the testator's father had failed during the twenty-one years, but there had at the end of that period been living paternal and maternal relatives of the testator, the maternal nearer than the paternal?

It is obvious that if it could be maintained, as suggested in *Doe v. Plumtre (a)* (where Coke Lit. and a very learned note by Mr. Hargrave are referred to), that the testator has required the person or persons to take at the end of the twenty-one years to be, at that time, absolutely either the nearest or some or one of the nearest of kin (whatever the possible necessity of any additional qualification), or if it could be asserted that the testator's intention in using the words "in the male line in preference to the female line," was merely to *postpone or exclude those *68 only related to him maternally in favour of his father's blood, the appellant has no title, his claim depending altogether on the validity of the proposition (in my judgment I repeat untenable) that the gift in dispute was to the person or persons who, at the end of the twenty-one years, should be the testator's nearest male agnate or nearest male agnates, howsoever distant in blood, and whatever the proximity of collateral kindred otherwise related to him.

I have but to observe further that, in what has been stated, I have assumed two points (which, viewing the appellant and Mr. and Mrs. Bradley as the only parties substantially to the contest before us, it was safe to assume, but upon which I have not meant to give an opinion prejudicial, nor do I now make any intimation of encouragement to any other claimant): first, that the words under discussion are intelligible, are capable of construction, and

(a) 3 B. & A. 474.

next that whatever may be the range of the word "lineal," considered by Mr. Collyer in a note to *Craik v. Lamb*, (a) to speak of a man's merely collateral kindred as related to him in any "line" is not an improper use of language, but equally allowable with the genealogical *transversa linea* of the civil lawyers.

THE LORD JUSTICE TURNER. — The sole question which we are called upon in this case to decide is, whether the appellant is entitled to the capital of the residuary estate of Admiral Sayer, the testator in this cause.

The testator, Admiral Sayer, by his will, dated the 13th July, 1816 [his Lordship read it].

• 69 • From the terms of this will, it is evident that the testator, at the time, contemplated obtaining a grant of arms, and accordingly, some time after the date of the will, and in the year 1821, he procured this grant. [His Lordship read it; the substance is set out in Mr. Hare's report.]

After obtaining this grant, and on the 29th of March, 1831, he made a codicil to his will. [His Lordship read it.]

At the foot of this codicil he wrote a memorandum, dated in April, 1831. [His Lordship read it.]

At the foot of the memorandum there is written his monumental inscription, describing him as the eldest of the three sons of Benjamin Sayer, Esq.

He died on the 29th of April, 1831, without having been married, and the term of twenty-one years mentioned in the codicil expired on the 29th of April, 1852.

The testator, at the date of his will, had two brothers and six sisters, all of whom survived him; but the two brothers and five of the sisters died during the term of twenty-one years. The other sister, Mrs. Bradley, survived the expiration of the term. The two brothers died without issue, and had never been married.

The appellant is the first cousin of the testator. He was not the testator's nearest of kin at the expiration of the term of twenty-one years, Mrs. Bradley, the testator's sister, being then living; but he is the son of the testator's paternal uncle, and, tracing the relationship to the testator through males only, he is the nearest relation the testator had at the expiration of the twenty-one years'

(a) 1 Coll. 489.

term. His claim to the residue rests entirely upon this foundation. In order to make it good, he must establish * that, * 70 according to the true meaning of the will, codicil, and memorandum of this testator, he answers the description of the testator's next of kin in the male line, in preference to the female line.

It was argued, on his behalf, that the description applied by this testator to the person who was to take the capital of his property, that of "nearest of kin in the male line in preference to the female line," applied and could only apply to a male claiming through a continuous line of males; and the argument was supported by reference to the cases in which that meaning has been attributed to the words "male descendant" and "male lineal descendant." But I much doubt the application of those cases to a case like the present. In those cases, there is a designation of the person to take, independent of the line through which he is to take. The description can be answered by a male only. But in this case there is no designation of the persons to take, independent of the line through which they are to take, except by the general term "next of kin," which may apply to a female as well as to a male.

Assuming, however, that under a disposition of personal property to the nearest of kin in the male line, in preference to the female line, unexplained by any context, and unaccounted for by any surrounding circumstances to which the Court, placing itself in the position of the testator, could refer, the property would go to the nearest male relation deriving through a continuous line of males, there can be no doubt that the context and the surrounding circumstances may alter this destination, and show that the person who would thus be entitled in the absence of context and of surrounding circumstances was not the person who was intended by the testator to be the recipient of his bounty. And, in my opinion, the * context of these instruments, coupled * 71 with the surrounding circumstances, is sufficient to show that this testator, when he used the expression "my nearest of kin in the male line in preference to the female line," did not intend to describe a male person claiming through a continuous line of males.

This testator, by his will, has given the income of his property as to three-fourths to his brothers and sisters, and one-fourth to

his nephews and nieces, until the death of the last survivor of his brothers and sisters; and then he has given three-fourths of the income to his nephews and nieces, and one-fourth to the children of the nephews and nieces, until the death of the last survivor of the nephews and nieces. It is clear, therefore, that when he made his will he contemplated that there would be children of the nephews and nieces when the last survivor of them died, and the codicil shows that he also contemplated that there might be such children at the expiration of the twenty-one years' term. He must have known then that these children might be his nearest of kin, or some of his nearest of kin. Then he gives the capital of the property thus: "At the termination of which period of twenty-one years, the whole capital sum then standing in the books of the Bank of England in virtue of my will, and this a codicil thereto, shall remain to be disposed of towards my then nearest of kin in the male line in preference to the female line."

The words "male line" here are evidently used in contradistinction to "female line," and if the male line means a male claiming through males, the female line must equally mean a female claiming through females; and what then would be the result, supposing the children to be the nearest of kin?

* 72 That the daughters of * nephews would not be included in the terms of gift, nor the sons of nieces in the terms of exclusion. A construction leading to such a result cannot surely be reasonable.

Again, the provision as to the change of name clearly shows that the testator contemplated that a person not bearing his name might succeed to his property. But a male claiming through males could bear no other name, unless, indeed, in the unusual case of a change of name, an event to which, in the absence of any such indication, we should not, I think, be justified in considering the testator to have referred. Where a testator refers to a state of things which may happen in the ordinary course, or may happen under extraordinary circumstances, it would not, I think, be a sound rule of construction to refer the language which he has used to the extraordinary and not to the ordinary course of events.

But, again, there is, I think, yet more convincing evidence, upon the face of these instruments, that this testator had no such intention as the appellant must establish in order to maintain his

claim. By the memorandum various articles, which the testator enumerates, are to descend with the patent of his armorial bearings to the inheritor hereafter of his capital property. He thus shows that the person to whom his patent would descend was the person who was intended to take his property; and the patent is limited to the descendants of his father. It is clear, therefore, that he intended the descendants of his father to take in preference to more remote relations. It is further remarkable, in connection with this subject of the arms, that, in the will, he uses the term "assume" as to the name, but * drops it as to the * 73 arms, and contents himself with the expression that they shall be borne and used.

These considerations, and others which are adverted to in the Court below, have satisfied my mind that this testator had no such meaning as has been imputed to him by the appellant, and I concur, therefore, in opinion that this appeal must be dismissed.

KEY v. KEY.

1853. April 27. May 3, 7. Before the LORDS JUSTICES.

A testator, before the Wills Act came into operation, devised his "estate" at A. to S. K., for life, charged with life annuities, but in case the annuitants, or any one of them, survived S. K., he gave the aforesaid "estate" to S. K.'s eldest surviving son, charged with the annuities, but in default of issue male he gave the aforesaid "estate" to T. K., charged in like manner, and unto his eldest son upon the same conditions, but in default of issue male the premises were to descend to the testator's heirs, charged as above:

Held, —

1. That the limitation to S. K.'s eldest surviving son ought not to be construed literally so as to make it dependent on S. K. being survived by one of the annuitants.¹
2. That the words "in default of issue male" were not to be construed referentially as meaning in default of an eldest surviving son, but generally, so as to give S. K. an estate in tail male.²
3. That the use of the word "estate" was not in the above will sufficient to give the eldest surviving son of S. K. an estate in fee-simple.³

¹ See *Hannam v. Sims*, 2 De G. & J. 151, 157.

² See 2 *Jarman Wills* (3d Eng. ed.), 447, 458.

³ See 2 *Jarman Wills* (3d Eng. ed.), 262; *Martin v. M'Causland*, 4 Ir. Law Rep. 340; *Tyrone v. Waterford*, 29 L. J. Ch. 486.

was now vested in him under the will of John Key, of Fulford.

- 76 • 4th. Whether John Reeve had become entitled to any, and what, estate or interest in the Ashby Folville estate.

Mr. Glasse and *Mr. Dickinson*, for the plaintiff. — First. The limitations to take effect after the death of Samuel Key could not have been intended to be contingent upon a perfectly collateral event, such as that of Samuel Key being survived by all or any of the annuitants. That contingency must be read as qualifying the words “charged with the aforesaid annuities” only, and not as applying to the limitation itself. Any other construction would involve an absurdity, while that suggested would be in conformity with the principles on which Courts have acted in many cases. *Anonymous*, (a) *Webb v. Hearing*, (b) *Holmes v. Cradock*, (c) *Pearsall v. Simpson*, (d) *Quicke v. Leach*. (e)

Secondly. The limitation to Samuel Key for life with remainder “to the eldest surviving son of Samuel Key, with remainders over in default of issue male,” must mean in default of issue male of Samuel Key, so that Samuel Key took an estate in tail male. The plaintiff therefore as the heir male is entitled to the estate.

They also cited *Robinson v. Robinson*, (g) *Attorney-General v. Sutton*, (h) *Doe v. Halley*, (i) *Wight v. Leigh*, (k) *Parr v. Swindels*, (l) *Doe v. Gallini*, (m) *Doe v. Lucraft*, (n) *Massey v. Hudson*. (o)

- 77 • *Mr. Lee* and *Mr. Lonsdale*, for Jane Key, cited *Luxford v. Cheek*, (p) *Tompkins v. Tompkins*. (q)

Mr. Roundell Palmer and *Mr. Druce*, for Miss Frances Key. — The words “in default of issue male” must be read with reference

(a) 2 Vent. 363.

(b) Cro. Jac. 415.

(c) 3 Ves. 317.

(g) 1 Burr. 38; 2 Ves. 225; S. C., *nom. Robinson v. Hicks*, 3 Bro. P. C. (Tomlin's ed.) 180.

(h) 1 P. Wms. 753.

(i) 8 T. R. 5.

(k) 15 Ves. 564.

(l) 4 Russ. 283.

(m) 3 A. & E. 340.

(d) 15 Ves. 29.

(e) 13 M. & W. 218.

(n) 1 Moo. & Scott, 573.

(o) 2 Mer. 130.

(p) 3 Lev. 125.

(q) Prec. Ch. 397.

to the issue male previously mentioned, viz., an eldest surviving son. *Money Penny v. Dering*, (a) *Bennett v. Lowe*, (b) *East v. Cook*, (c) *Hudson v. Bryant*, (d) *Doe v. Fricker*. (e) There having been an eldest surviving son to whom the "estate" was devised, charged with annuities, he took in fee-simple.

Mr. Malins and *Mr. Dugmore*, for John Reeve, the heir-at-law. — First, the ordinary and correct interpretation of the words used by a testator must be adhered to, unless it can be shown that the testator used them in a different sense, and no transposition or interpretation can be made, merely because the disposition as it stands may appear capricious. Applying that rule to the present case, there is no devise in the event which happened of all the annuitants dying in the lifetime of Samuel Key.

Secondly, if the Court should think otherwise, still the devise was to the eldest surviving son for life, or in tail male, and the reversion descended to the heir.

They cited and commented upon *Shulldham v. Smith*, (g) *Denn v. Bagshaw*, (h) *Amersbury v. Brown*, (i) *Doe v. Cooke*, (k) *Foster v. Romney*, (l) *Hay v. Coventry*, (m) * 78 *Doe v. Lean*, (n) *Massey v. Hudson*, (o) *Holmes v. Craddock*, (p) *Browne v. Lord Kenyon*, (q) *Parr v. Swindels*, (r) *Early v. Middleton*, (s) *Bird v. Luckie*, (t) *Dicken v. Clarke*, (u) *Wilson v. Eden*, (v) *Thornhill v. Hall*, (w) *Doe v. Haslewood*, (x) *Livesey v. Livesey*, (y) *East v. Twyford*, (z) *Doe v. Vaughan*, (aa) *Doe v. Tucker*, (bb) *Doe v. Taylor*, (cc) *Doe v. Charlton*. (dd)

Judgment reserved.

(a) 7 Hare, 568.

(b) 5 Moore & P. 485.

(c) 2 Ves. 30.

(d) 1 Coll. 681.

(e) 6 Exch. 510.

(g) 6 Dow, 22.

(h) 6 T. R. 512.

(i) 1 Ves. 477, 482.

(k) 7 East, 269.

(l) 11 East, 594.

(m) 3 T. R. 83.

(n) 1 Q. B. 229.

(o) 2 Mer. 180.

(p) 3 Ves. 317.

(q) 3 Madd. 410.

(r) 4 Russ. 283.

(s) 14 Beav. 453.

(t) 8 Hare, 301.

(u) 2 Y. & C. 572.

(v) 14 Q. B. 256.

(w) 8 Bli. N. S. 88.

(x) 10 C. B. 545.

(y) 2 H. L. Cas. 419.

(z) 9 Hare, 713.

(aa) 5 B. & A. 464.

(bb) 3 B. & Ad. 473.

(cc) 10 Q. B. 718.

(dd) 1 Man. & Gr. 429.

May 7.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the plaintiff is neither the heir nor the co-heir, nor descended from any heir or co-heir of the testator, who died a bachelor, and whose heiress presumptive when he made his will, and heiress at his decease, was his sister, Mrs. Reeve, the grandmother of one of the defendants.

It seems that Samuel Key, named in the will as a particular devisee, was not otherwise related to the testator than as his first cousin, once removed, but was his kinsman through males exclusively, and the state of the family was such that if a freehold of inheritance had been settled on the testator's paternal grandfather in tail male, it would on the testator's death, happening * 79 * either when it did or immediately after the making of the will, have descended or devolved from the testator on that Samuel Key in tail male *per formam doni*; and would also, *per formam doni*, have descended or devolved from him at his death on his eldest son, the deceased John Key, of Fulford, and from him at his death on his brother, the plaintiff. These circumstances were admitted on all hands at the bar, and it was in the same manner admitted that Samuel Key, the particular devisee, was the same person as Samuel Key the residuary legatee and executor; that not any issue of Samuel Key the devisee was born in the testator's lifetime, and that Samuel Key, the devisee, had a brother of the whole blood, named Thomas Key, who was born before the will, and being the person mentioned in the case as having died in the year 1833 must have survived the testator. Aware of these facts, we are to interpret the language of the will.

The first question is, whether the words "but in case the aforesaid annuitants, or any one of them, shall survive the said Samuel Key, I then give and bequeath the aforesaid estate at Ashby Folville unto the eldest surviving son of the said Samuel Key charged with the aforesaid annuity" are to be construed literally and strictly, and to be treated for every purpose and in every sense in the order in which they stand. It would, in my opinion, be prodigiously wrong to do so. I think it plain that the words "but in case the aforesaid annuitants, or any one of them, shall survive the said Samuel Key," are to be understood and treated exactly as if

they had not stood where they are, but had been inserted immediately before the word "charged." This point I consider scarcely susceptible of reasonable argument. The testator, in the passage that I have quoted, mentions the annuitants and annuities for the mere purpose of declaring that the property is to remain liable to the * annuities, until their extinction respectively * 80 not with a view to make the title of any person to the property dependent on the life or death of any annuitant.

Then comes the question of the meaning of the words "but in default of issue male," twice used. In default of whose issue male? It is, I think, manifest that the testator means issue male of Samuel Key, the devisee, where the words first occur, and issue male of his brother Thomas where the words secondly occur. It is a different point whether by construction the word "such" should or should not be inserted immediately before the words "issue male." Of course I do not dispute such an authority as *Morse v. Lord Ormonde*, (a) decided by Lord ELDON, as correctly, I believe, as it was usual for him to decide; and if the intention of the testator in the present case, to be fairly collected from the whole of his will, would have been saved from disappointment and defeat by interpreting the instrument as if the word "such" had immediately preceded the words "issue male," I should have felt no difficulty in thus reading and construing it, but my deliberate opinion is that such a construction of this will is not only unnecessary, but would be rather opposed than conformable to the testator's wishes to be collected from the whole of the instrument, and would be unreasonable. Those, I suppose, who read "issue male" as "such issue male," hold that, had Samuel Key and his brother Thomas died respectively leaving no son, but leaving grandsons in the male line, those grandsons would have taken nothing, and that the Ashby estate would in that event on the death of Samuel have gone under the will, though in a sense by descent from the testator, through Mrs. Reeve and her son William to General Reeve, the testator's present heir. I think * there * 81 is on the face of the will demonstration that the testator intended otherwise. Its contents satisfy me that he meant, as to the Ashby estate, to postpone the female line, to postpone his sister and her descendants, not only to Samuel and Thomas

(a) 1 Russ. 882.

Key, but to all their male descendants in the male line. In short, I view the will as containing nothing to warrant, but much to prohibit, the reading of "issue male" as "such issue male."

If then the word "such" is not to be added, Samuel Key, the devisee, must certainly, I conceive, be held to have taken under the will an estate in tail male, subject to the single question, whether his eldest surviving son took an estate in fee-simple, in remainder, expectant on Samuel Key's death; for it cannot rationally be contended that "the eldest surviving son" of Samuel Key took an estate in tail general, and if "the eldest surviving son" of Samuel Key took an estate for life or an estate in tail male, that in my opinion is for every present purpose immaterial.

The use of the word "estate" does not render it necessary to answer this question in the affirmative. It is a question of intention, and if the general intention, to be collected from the whole instrument, will be effectuated by holding that Samuel Key's "eldest surviving son," besides such interest as may be said to be taken by the issue heir in tail male of a tenant in tail male, took no interest except as a devisee for life, or no interest except as a devisee in tail male, or no interest at all, it is competent to the Court, and the duty of the Court, to hold that Samuel Key's "eldest surviving son" did not take an estate in fee-simple. I am accordingly of opinion that Samuel Key's "eldest surviving son"

did not take an estate in fee-simple, for upon a different view
 * 82 of the will in the events — the probable events — * that happened, every limitation of the property except in favour of that "eldest surviving son" was from the moment of Samuel Key's death annihilated.

I think that Samuel Key was made by the will tenant in tail male, either immediately or in remainder expectant on a life-estate or an estate in tail male, in his eldest surviving son, and of course therefore I think that the plaintiff, upon his elder brother's death without male issue, became entitled in possession to the devised estate, as heir in tail male of Samuel Key, subject to the claim (not disputed by the plaintiff) of his elder brother's widow to dower.

This conclusion in the plaintiff's favour seems to me consistent with reason and good sense, opposed neither to *Blackburn v. Edg-*

ley, (a) nor to *Morse v. Lord Ormonde*, (b) and supported if not rendered necessary by numerous authorities of great weight and consideration, among which it may perhaps not be quite superfluous to specify, upon one point, *Pearsall v. Simpson*, (c) *Massey v. Hudson*, (d) *East v. Cook*, (e) *Brownsword v. Edwards*, (g) *Boon v. Cornforth*, (h) and as to the rest the case on Mr. Sutton's will (i), and *Roe v. Grew*, (k) *Stanley v. Leigh*, (l) *Robinson v. Robinson*, (m) in the House of Lords as *Robinson v. Hicks*, (n) *Doe v. Halley*, (o) *Jesson v. Doe*, (p) usually cited as *Jesson v. Wright*, *Wight v. Leigh*, (q) and a case in Barnwell & Cresswell of *Doe v. Harvey*. (r)

* I will venture to read the judgments in two of them; they * 83 are Sir WILLIAM GRANT'S. In *Pearsall v. Simpson*,¹ he says, "The only question is whether Richard Stafford's taking for life was a condition precedent to the cousins of the testatrix taking the capital. That would be a most absurd condition undoubtedly; for there is no sense or reason, making the right of her first cousins depend upon a fact totally unconnected with any intention as to them. What was it to them, whether Richard Stafford took, or not? Such a construction is not to be made, unless absolutely necessary. It is very different from the case put by *Mr. Cooke*; a case of direct condition, that if A. lives to a particular period he shall take: otherwise he shall not. It was doubtful whether Richard Stafford would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects that he may not live to take the interest: but if he does she makes his death the period at which her first cousins are to take. It is not a condition precedent, but fixing the period at which the legatees over shall take, if he ever takes. The words will bear that construction, and the reason of the thing seems to require it."

(a) 1 P. W. 600.

(e) 2 Ves. 30.

(b) 1 Russ. 382.

(g) 2 Ves. 243.

(c) 15 Ves. 29.

(h) 2 Ves. 277.

(d) 2 Mer. 130.

(i) Attorney-General v. Sutton, 1 P. W. 754; 3 Bro. P. C. 75.

(k) 2 Wil. 322.

(o) 8 T. R. 5.

(l) 2 P. W. 686.

(p) 2 Bl. 1.

(m) 1 Burr. 38.

(q) 15 Ves. 564.

(n) 3 Bro. P. C. 180.

(r) 4 B. & C. 623.

¹ See 1 Jarman Wills (3d Eng. ed.), 767; *Wright v. Wright*, 21 L. J. Ch. 775.

In *Wight v. Leigh* he says, "The evident intention of this testator was to prefer all the male issue of somebody, either of the plaintiff or of his first and other sons to the daughter; but she has not given such an interest to any one as would enable male issue, generally, to take; for all that is given to the plaintiff, is what amounts in law to an estate for life, and so it is with regard to the estates given to his first and other sons. It is necessary, therefore, in order to effectuate the general intention in favour of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male to take;

which can only be by giving an estate tail either to the father,
* 84 or to his first * and other sons. The male issue intended

must, I think, be the male issue of the father, not of the sons. Nothing is before mentioned of any issue male of the sons; whereas there is a certain description of male issue of the father before spoken of, namely, his first and other sons. Therefore the failure of issue male intended must be of issue male of the father, rather than of the sons. When the Court has determined what is the effect of the limitation, it is the duty of the trustees to convey accordingly; and the construction I put upon this will being that this is a limitation to the issue male of the father, they must so make the conveyance."

Mr. Dugmore, in the course of his learned and able argument (in which he so strongly recommended the letter as a safe and steady guide, and warned us against the seductions of the spirit), having pressed on us, or on me at least, some observations made on another occasion, it may not be improper to add that I do not see any reason for departing from what I did, or qualifying what I said, in *Bird v. Luckie*, (a) (the case that he brought to bear on me particularly), or in *Evans v. Jones*, (b) reported in the second of *Mr. Collyer's* volumes.

I agree "*certa pro incertis non relinquenda*," but I say also, "*In obscuris quod verisimilius*," and as "*Leges non ex verbis sed ex mente intelligendas*," so of wills. In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its

(a) 8 Hare, 301.

(b) 2 Coll. 516.

contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the * instrument, read as a whole, persuades * 85 and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.¹

Such decisions upon controversies “ex scripto et sententia,” as Cicero terms them (*a*), — “scripti et voluntatis” in the language of Quintilian (*b*), — who, citing the *judicium Curianum*, says, (*c*) “In testamentis et illa accidunt ut voluntas manifesta sit, scriptum nihil sit,” and adds, “Id quoque, quod huic contrarium est, accidit nuper ut esset scriptum quod appareret scriptorem noluisse,” (*d*) — have been of course frequent and familiar when and wherever justice has been administered among civilized and enlightened men. This is a controversy of that class; and though it may perhaps seem neither necessary nor very apt in a cause of the particular species of the present to refer to such cases as *Browne v. De Laet*, (*e*) *Church v. Munday*, (*g*) and *Bootle v. Blundell*, (*h*) yet the language of Lord THURLOW and Lord ELDON in those instances seems to me not without application. Nor does Lord ELDON’s reference, with apparent assent, in *Wykham v. Wykham* (*i*) and *Wilkinson v. Adam*, (*k*) to Lord HARDWICKE’s expression in *Coryton v. Helyar*. (*l*) The language, as given in *Wilkinson v. Adam*, (*k*) is “necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed.” The phrases given in *Wykham v. Wykham*, (*i*) are “probable necessity,” and “an implication so probable that the mind could not resist it.” *Mr. Cox’s* report is thus: “There is hardly any case where an implication is of necessity, but it is called * ‘necessary’ because the Court finds it so to * 86 answer the intention of the devisor.” Finally, I may mention the present Lord Chancellor’s opinion in a recent case of

(*a*) De Inv. Rhet. lib. 2, c. 42.

(*b*) Inst. Orator. lib. 7, c. 6, § 1.

(*c*) *Ib.* § 9.

(*d*) *Ib.* § 11.

(*e*) 4 Bro. C. C. 527.

(*g*) 12 Ves. 426.

(*h*) 1 Mer. 193; 19 Ves. 494.

(*i*) 18 Ves. 395.

(*k*) 1 V. & B. 466.

(*l*) 2 Cox, 340.

¹ See *Crofts v. Middleton*, 8 De G., M. & G. 216; *Ware v. Watson*, 7 De G., M. & G. 259.

Hart v. Tulk, (a) where it was held by his Lordship and myself that a schedule had been described in a will by a wrong number, and the authorities there referred to.

THE LORD JUSTICE TURNER. — I have little to add in this case. The cases upon this subject are so numerous, and the distinctions upon them so subtle, that no general rule can be deduced from them beyond this, that it is the duty of the Court, as far as possible, to collect and carry out the intention of the testator.

The first question which arises on this will is whether all the dispositions of the estate after the death of Samuel Key were meant to be contingent upon his being survived by all or any one of the annuitants. This depends upon the construction to be put upon the clause, “but in case the aforesaid annuitants or any one of them shall survive the said Samuel Key, I then give and bequeath the aforesaid estate at Ashby Folville unto the eldest surviving son of the said Samuel Key, charged with the aforesaid annuities, but in default of issue male I give and bequeath the above-demised premises unto his brother Thomas Key, charged in like manner with the aforesaid annuities, and unto his eldest surviving son on the same condition, but in default of issue male my will is that the aforesaid demised premises do descend unto my heirs-at-law, charged nevertheless with the above-mentioned annuities or out-payments.” Was it intended by this testator that

the eldest surviving son of Samuel should take the estate * 87 only in the event of its being charged * with the annuities, or that he should take the estate charged with the annuities if they should be subsisting at the death of Samuel? Now this estate was the principal and the favourite subject of the testator’s dispositions, and whatever other intention he may have had respecting it, no one can doubt that it was not his intention to die intestate as to it. But if the eldest surviving son of Samuel was to take the estate only in the event of the annuitants, or of any of them, surviving Samuel, there would be an intestacy, as to this estate, beyond the life-interest of Samuel, if (as the event happened) all the annuitants died in his lifetime. This would be a consequence so foreign to the testator’s intention that the Court certainly ought not to adopt it if any other reasonable construction

(a) 2 De G., M. & G. 300.

can be found, and I think the reasonable and true construction is, that the eldest son of Samuel was to take the estate charged with the annuities if the annuitant survived Samuel. The context seems to me to favour this construction. The testator has throughout treated these annuities as charges on the successive interests of the devisees. Each successive devise is expressed to be "charged with the aforesaid annuities." In the clause immediately preceding the devise to the eldest surviving son of Samuel he had been dealing with the annuities, and, as it seems to me, considered that he had charged them only upon the life-estate of Samuel, and therefore, when he commences the new disposition after the death of Samuel, he takes up the annuities and charges them upon the interest of the devisee. It is for this reason I think the testator has used the word "but," which may be well understood if referred to the annuities, but can have no proper meaning if referred to the devise in favour of Samuel's son. My opinion therefore is, that the ulterior devises are not contingent upon the annuitants surviving Samuel.

* We come, then, to the material question in the case. * 88
What estates are taken by the devisees? According to the terms of the devise, the estate is to go to Samuel for life, then to the eldest surviving son of Samuel, charged with the annuities, but in default of issue male, to Samuel's brother Thomas, charged in like manner with the annuities, and to his eldest surviving son on the same conditions, but in default of issue male, to the testator's heirs-at-law. Now, one thing is here clear, that the estate is to go over to Thomas and his son, and afterwards to the heirs only, in default of issue male, and we must therefore consider what is the meaning of these words, "in default of issue male." Do they mean in default of an eldest surviving son, or do they mean in default of issue male of an eldest surviving son, or do they mean in default of issue male of Samuel?

The first construction of the words, that they mean in default of an eldest surviving son, was maintained by the defendants, Jane Key and Frances Key, who are devisees under the will of John the eldest son of Samuel, and on whose behalf it was argued that he took in fee. But I am of opinion that this construction cannot be maintained. To put this construction upon the will would be to read the words "in default of issue male" as if they were "in default of such issue male." It was indeed argued that

where there was a gift to a particular description of issue, and a gift over in default of issue, the gift over was in all cases construed to be in default of the issue particularly described, but this argument clearly went too far. It was then attempted to class the cases in which the gift over in default of issue was to be limited to issue particularly described, and to bring this case within the rules propounded. But it is obvious that no general rule can be

laid down upon a subject on which the testator's intention,
 * 89 expressed by * the will must, in each case, be the only guide.

Now, if this testator had intended the estate to go over in case there was no eldest surviving son of Samuel, why was the phraseology of the will altered? Why are the words "in default of issue male" used, instead of the words "in case there shall be no eldest surviving son," the very form of expression which he had used with reference to the annuitants in the introduction of this very devise? Why is the expression in the dispositive clause eldest surviving son, and in the gift over male issue? Male issue is a technical term, and there is no context which I can find to warrant the Court in putting upon it any other than its technical construction. The context in the will seems to me to favour the extended rather than the restricted meaning of the words male issue; for it is clear that this testator preferred the male branches of his family. He has given them the estate in preference to his sister, and any construction which limits the natural meaning of the words "male issue" would tend to defeat the preference he has shown. It would accelerate the ultimate limitation in favour of his heirs.

The second construction of the words, that they mean in default of issue male of the eldest surviving son of Samuel, was contended for by the other defendant, General Reeve, the testator's heir, on whose behalf it was argued that John took an estate tail, but I am also of opinion that this construction cannot be maintained. The devise is in favour of the eldest surviving son of Samuel, and when the testator speaks of default of issue male, I think he must be taken to refer to the class of which the devisee whom he has described is a member.

My opinion, therefore, is that the words "in default of issue
 * 90 male," mean "in default of issue male of * Samuel," and that the estate being given over only upon the general failure of Samuel's issue male, he took an estate in tail male. This estate

not having been barred by John, I think the plaintiff is entitled.

Whether the estate tail in Samuel was immediate or expectant upon an estate in either or both of his sons, it is not necessary to determine. In either case the plaintiff is entitled.

GOODWIN v. FIELDING.

1853. April 28, 30. May 2, 9. Before the LORDS JUSTICES.

The executrix of a lessee agreed to sell to A. the residue of her term (except a day) and the fixtures on the premises for 400*l*. This agreement was entered into by the executrix without advice, and there was no written memorandum of it except a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l*. A., on hearing of this, offered the executrix, if she would complete her contract with him, 1000*l*. as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A. for the whole term wanting a day: *Held*,

1. That the original agreement (if any) with A. was such in its nature and circumstances as not to be of any validity in equity, unless the price was shown to be equal or more than equal to the value of the property.¹
2. That as this was not shown the landlord was entitled to a specific performance of his agreement, not only against the executrix, but against A.

Quære, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the Statute of Frauds.²

THESE were two appeals from a decree of Vice-Chancellor STUART, directing the specific performance of an agreement under the following circumstances, as appearing upon the affidavits in support of and in opposition to a motion for a decree.

By an indenture of lease dated the 19th of August, 1842, the plaintiff demised to James Fielding (since deceased) the Beulah Spa hotel, at Norwood, with the appurtenances, for twenty-one

¹ See 1 Sugden V. & P. (7th Am. ed.) [57].

² See Bayley v. Fitzmaurice, 8 El. & Bl. 664; S. C., 9 H. L. Cas. 78; Farwell v. Mather, 10 Allen, 322; Ridgway v. Wharton, 3 De G., M. & G. 697, and cases in note (1).

years ; and by another indenture of lease, dated the 31st of August, 1846, the plaintiff demised to James Fielding a cottage and
 * 91 land * adjoining, with the appurtenances, from the 24th of June, 1846, for the term of sixteen years thence next ensuing.

James Fielding died on the 3d of March, 1851, having by his will, dated the 3d of February, 1849, bequeathed to his wife, the defendant, Eliza Anne Fielding, all his leasehold premises at Norwood during her life or widowhood, with power, in her discretion, to sell and dispose of all and every or any of the same ; and he appointed her sole executrix of his will, which she proved on the 20th of June, 1851.

About the middle of July, 1852, negotiations were entered into between Mrs. Fielding and James Franks (another defendant), who was the owner of land adjoining the demised premises, for the purchase by him of the Beulah Spa Hotel. In the course of these negotiations, Mr. Franks called on Mrs. Fielding at the hotel, and she then told him that she would soon be ready to treat with him.

On the 10th of August, 1852, a Mrs. Ritchie, who was a relative of Mr. Franks's wife, and was staying with Mrs. Fielding at the hotel, sent for Mr. Franks, by Mrs. Fielding's request, with a view to a treaty for the sale of the lease. He accordingly, on that day, called on Mrs. Fielding at the hotel, and had an interview there with her in the presence of his wife and Mrs. Ritchie. Mrs. Fielding then stated to him, in the presence of his wife and Mrs. Ritchie, that she could not assign the lease of the premises, because there was an express clause in it prohibiting her from so doing, but that she could give him an underlease. She then said : " Well, Mr.

Franks, I am now quite in a position to offer you the place.
 * 92 I am a woman of business, and * shall say what I have to say in few words." Mrs. Fielding then asked him 800*l.* for the underlease, good-will, and licenses and premises. Mr. Franks replied, " Why do you ask more than was named before, when you last talked with me respecting it ? " " Well," she said, " what will you give me, Mr. Franks ? " He replied, " I would give what was named before, namely, 300*l.*" Mrs. Fielding then said she hoped Mr. Franks would give her more, and that if he would give her 400*l.* she would immediately consult with her family, and let him know the result in half an hour. On his agree-

ing to this, Mrs. Fielding quitted the room. In about half an hour she returned, and told him that he should have the premises. She also observed, "Now you quite understand that I cannot assign the lease, but I can grant an underlease," to which Mr. Franks assented. Some further conversation then ensued between Mrs. Fielding and Mr. Franks as to the time when possession should be given to him of the premises, and she said she thought he could not have it in the September quarter, but that he could depend on it at the half-quarter between Michaelmas and Christmas.

After the terms of the arrangement had been thus settled between Mrs. Fielding and Mr. Franks, Mrs. Fielding informed him that Mr. Cornthwaite, of the Old Jewry, was her solicitor; that she had known him many years, and would give Mr. Franks his address, in order that he might call upon Mr. Cornthwaite. She also said that she was writing to Mr. Cornthwaite herself upon the matter, so that he might get forward with the necessary documents. At the conclusion of the interview she said, "Now, if you should like to renew our lease, I recommend you to write to Mr. Goodwin, the landlord, or I will do it for you."

* On the 11th of August, 1852, Mrs. Fielding wrote, signed, * 93 and sent to Mr. Cornthwaite the following letter:

"Norwood, August 11, 1852.

"Dear Sir, — Last night I settled with Mr. Franks, and fear I have not done so well as I ought, having agreed to give him the lease, fixtures of the house, stoves, garden boxes, seats, and marquee, for 400*l*. He has engaged to paint and thoroughly repair. The rain has prevented my coming into the city to-day, but I will, if possible, to-morrow. Perhaps Mr. Franks may call on you before I see you, and he is so dreadfully sharp to deal with that I thought it best to give you this information. Of course, he knows nothing about the mortgage, which I must pay, therefore there is no occasion to mention it."

On the 12th of August, 1852, Mr. Franks called on Mr. Cornthwaite at his offices in the Old Jewry, and had some conversation with him respecting the agreement with Mrs. Fielding.

On the evening of the 12th of August, 1852, Mr. Franks again called on Mrs. Fielding, who asked him whether he had seen Mr.

Cornthwaite, and whether every thing was right, to which Mr. Franks replied that he had seen Mr. Cornthwaite, and that all was settled, or to that effect.

A few days afterwards, Mr. Franks called on Mr. Cornthwaite again, and arranged with him that, as his solicitor was out of town, Mr. Cornthwaite should act as his solicitor in the business. A draft of the proposed underlease from Mrs. Fielding to Mr.

Franks was shortly afterwards prepared by Mr. Cornthwaite.

* 94 On the 11th of August, 1852, Mr. Franks wrote and * sent a letter to the plaintiff, informing him that Mrs. Fielding had assigned to Mr. Franks all her interest in the hereditaments and premises.

The plaintiff, by his affidavit, deposed that he was much surprised at the statement contained in the letter from Mr. Franks. He thereupon entered into a correspondence with Mrs. Fielding, to ascertain from her what had actually passed between her and Mr. Franks, and in the course of such correspondence the plaintiff reminded Mrs. Fielding that, by her lease, she could not assign the premises without the plaintiff's permission in writing.

On the 3d of September, the plaintiff sent to Mrs. Fielding the following letter : —

“ Hampton Court, September 2.

“ Dear Madam, — Mr. Franks wrote to me before I left town to say he had settled with you for the remainder of your lease, or rather he had taken it off your hands, and that he wished to see me. Since, I have been applied to by a stranger, to know if I would let him a renewal of the lease, provided he could make his terms with you.

“ I shall be in London on Saturday morning, and will meet Mr. Franks there, at any place he should appoint, if you have come to an arrangement with him ; but be so good as to send me a reply to this by return of post, as I am going on Saturday morning for a few days into Essex, and then at the end of the week I go to Scarborough, to join my family there, and may not be back for three weeks ; but, as far as I am concerned, I care not for any haste in the matter.

“ Faithfully yours,

“ W. J. GOODWIN.”

* On the 3d of September, Mrs. Fielding wrote to the * 95 plaintiff in reply to his letter, and informed him (having been instructed so to do by Mr. Franks) that Mr. Franks would be at his place of business, 14, Little Tower Street, on the following day, between the hours of eleven and two. The plaintiff, however, did not go there.

On the 24th of September, the plaintiff sent to Mrs. Fielding the following letter : —

“ Hampton Court, 23d.

“ Dear Madam, — I have just received a letter from Mr. Franks, and I request you will be so good as to inform me if you have signed a written agreement with him, and, if so, what the nature of it may be.

“ I intend going to town in the morning, and shall be at the Burlington Hotel, Cork Street, at twelve o'clock, where you can either see me or send to me. I really hope for your own sake that you have not placed yourself in the unenviable position that Mr. Franks would have me believe.

“ Yours truly,

“ W. J. GOODWIN.

“ I shall be away from home for ten days after Sunday next.”

On the 24th of September, Mrs. Fielding met the plaintiff at the Burlington Hotel, in company with her then intended son-in-law, who was a barrister. Mrs. Fielding on that occasion denied that she had signed any agreement with Mr. Franks. Whether she denied having entered into any agreement with him, or said that all negotiations between her and Mr. Franks were at an end, was the subject of conflicting testimony. Mrs. * Fielding * 96 deposed that she then informed the plaintiff of the agreement made between her and Mr. Franks on Tuesday, the 10th of August, and that the plaintiff inquired what sum Mr. Franks had offered to give; and that, on Mrs. Fielding replying 400*l.*, the plaintiff said he supposed she would be contented if he could get her 450*l.* or 500*l.* for her interest in the premises. Mrs. Fielding also deposed that on the 8th of October a Mr. Wm. Thompson, a surveyor, called, stating that he did so by the direction of the plaintiff, and examined the state of the repairs of the Beulah Spa Hotel; that he, after this examination, said they were in a state

of great dilapidation, and told Mrs. Fielding that the plaintiff might eject her for breach of covenant to keep in repair. That he asked Mrs. Fielding what she wanted for the lease, and that she said 600*l*. That, being alarmed at what was said by Mr. Thompson as to the plaintiff's power to eject her, she, on the 9th of October, went to her solicitors, and requested them to examine the covenants in the lease as to repairs, which Mr. Cornthwaite did, and informed her that the lease contained a positive covenant to keep in repair, for the breach of which the plaintiff might eject her without any compensation. That on the 27th of October, Mr. Thompson, by the direction of the plaintiff, but not by Mrs. Fielding's direction, or with her authority, attended at the Beulah Spa Hotel with an agreement in duplicate ready engrossed, blanks being only left for the sum to be paid by the plaintiff, the penalty for breach of agreement, and the dates of signing and for giving possession. That Mr. Thompson filled up the blank left for the purchase-money in the agreement so engrossed by inserting the sum of 550*l*.

* 97 By this memorandum of agreement, which was dated * the 27th of October, 1852, and was expressed to be made between Mrs. Fielding of the one part and the plaintiff of the other part, Mrs. Fielding agreed to sell to the plaintiff, for the sum of 550*l*., the messuages, tenements, hereditaments, and premises comprised in both the leases, with the appurtenances thereto belonging, for all the residue of the terms for which Mrs. Fielding held the same (being ten years unexpired from Midsummer Day then last) at the yearly rent of 185*l*., and subject to the covenants in the leases of the said hereditaments contained, and also to sell to the plaintiff the good-will of the trade carried on in the Beulah Spa Hotel; and also, by good and effectual assurances in the law, to assign the same and to deliver up possession, except such parts thereof as were underlet, to the plaintiff, or whom he might appoint, on or before the 2d of December then next, and to pay and clear up or make an allowance for all rent, taxes, rates, assessments, and gas rate due or accruing due for or in respect of the premises, to the day of giving possession, and to make good or allow for all external damaged windows; and also to sell to the plaintiff all the furniture, fixtures, and effects that then were in and upon the said premises mentioned in an inventory signed by Mrs. Fielding, together with all trade furniture, fixtures,

and utensils which were not mentioned in the inventory, but then were on the said premises, at the sum of 300*l.*; and also to sell to the plaintiff all her good and salable stock in trade (not exceeding the quantities and at the prices therein mentioned); and also to assign to the plaintiff, or to whom he should appoint, at the time aforesaid, the beer and other licenses for the hotel, and then and afterwards to do all such other acts and things as might be necessary in order to obtain a legal protection and the transfer of such licenses to the plaintiff, or whom he might appoint.

* A draft assignment was then prepared by the plaintiff's * 98 solicitors and sent to the solicitors of Mrs. Fielding, and was on or about the 7th of December, 1852, finally returned to the solicitors of the plaintiff, approved by Messrs. Cornthwaite and Wilson on behalf of Mrs. Fielding. It was afterwards engrossed.

Mr. Franks deposed that having heard of the negotiations between the plaintiff and Mrs. Fielding, he consulted his solicitors, who advised him that in consequence of his not having obtained a written agreement signed by Mrs. Fielding, he would have great difficulty in compelling the performance by her of the agreement; and being afraid that she would forthwith surrender the premises to the plaintiff, and that he should thereby be deprived of the benefit of his agreement with her, he agreed to give Mrs. Fielding 1000*l.* for the lease, and to give her a bond of indemnity against any proceedings on the part of the plaintiff, if she would perform her agreement with Mr. Franks.

Accordingly, on the 16th of December, 1852, Mrs. Fielding executed to Mr. Franks an underlease of the hotel and premises, and delivered to him the fixtures, furniture, and the licenses connected with the hotel; but the stock in trade and liquors of Mrs. Fielding on the premises were not purchased by him.

On the previous day the plaintiff's solicitor had attended at the Beulah Spa Hotel, at Norwood, with the engrossment of the assignment to the plaintiff for her execution, but found that she was from home.

On the 20th of December, the plaintiff filed the bill in the present suit, which, after stating such of the above facts as related to his agreement with Mrs. Fielding, * stated that the * 99 plaintiff, acting upon that agreement, and relying on the good faith of Mrs. Fielding, and on her positive assurances that

all negotiations between her and Mr. Franks were at an end, did, on the 3d of November, enter into an agreement with Thomas Masters, another defendant, whereby, in consideration of 1250*l.*, the plaintiff agreed to grant a lease of the premises to Mr. Masters, and the trade and good-will thereof for twenty-five years from Christmas-day then next at the yearly rent of 200*l.*, and subject to the covenants in such lease to be contained, and to deliver up to Mr. Masters the possession of the premises (except such parts thereof as were underlet) on or before the 2d of December, then next. The bill further stated that Mr. Masters, in pursuance and part performance of the lastly mentioned agreement, had paid to the plaintiff the sum of 200*l.* in part of the purchase-money, and insisted on his right under his agreement, and on having it specifically performed by the plaintiff.

The bill also stated that Mr. Franks had on many occasions by himself or his agents been informed by the plaintiff or his agents of the existence of the agreement of the 27th of October, and also of the agreement with Mr. Masters, and had admitted the validity thereof, and offered to pay to the plaintiff and Mr. Masters a considerable sum of money for the purchase of their rights and interests under the agreements. The prayer was for a specific performance of the agreement of the 27th of October against Mrs. Fielding and Mr. Franks, and that the underlease to the latter might be declared void and delivered up to be cancelled.

By the plaintiff's affidavit in support of the motion for a decree, he deposed that shortly after the memorandum of agreement of the 27th of October, 1852, had been * signed by * 100 Mrs. Fielding, full information of the agreement and of the nature and contents thereof was given by the plaintiff or his solicitor or agent to Mr. Franks, and that on the 3d of November following the plaintiff received the following letter from Mr. Franks: —

“ 14 Little Tower Street, London,
November 2, 1852.

“ Dear Sir, — You said in your last communication that you were not then prepared to treat with me for the Beulah Spa Hotel, &c. Knowing that you have now the whole matter entirely at your disposal, I shall feel much obliged by your letting me have the first offer. I think I shall be disposed to treat with you on

better terms than any one else, and should much prefer taking it of you. I make this communication to you without prejudicing my claim against Mrs. Fielding, which is in the hands of Messrs. Daws & Sons, who are eminent lawyers, and who state that I have without doubt a good case against her. But I hope that satisfactory arrangements may be made with you.

“ I remain

“ Yours faithfully,

“ JAMES FRANKS.”

The decree appealed from ordered that the agreement of the 27th of October, 1852, should be specifically performed and carried into effect. It declared that the underlease dated the 16th of December, 1852, was void, and ordered that the same should be set aside ; and that the defendants, Mrs. Fielding and Mr. Franks, should, within seven days after the service of that order upon them, respectively surrender unto the plaintiff the hereditaments and premises comprised in and agreed to be assigned by the memorandum of agreement of the 27th of October, 1852, such surrender to be * settled by the conveyancing counsel of the * 101 Court in rotation in case the parties differed about the same. And it was thereby ordered that the plaintiff should be let into possession of the Beulah Spa Hotel and the other hereditaments and premises comprised in the agreement of the 27th of October, 1852, and also into possession of the goods, chattels, and effects in and about the hereditaments and premises included in the agreement within seven days after the service of that order on the defendants, Mrs. Fielding and Mr. Franks. And the plaintiff was to pay Mr. Masters's costs, and was to be paid his own costs, and those which he should pay Masters, by the defendants, Mrs. Fielding and Mr. Franks.

From the whole of this decree the defendants, Mr. Franks and Mrs. Fielding, appealed separately.

Mr. Daniel and *Mr. Bristowe*, for the plaintiff. — There was really no concluded agreement between Mrs. Fielding and Mr. Franks. Even if there had been any such agreement there was no sufficient memorandum of it in writing, for Mrs. Fielding's letter to her own solicitor was not such a memorandum.

[THE LORD JUSTICE KNIGHT BRUCE. — Does the statute require the memorandum to be addressed to any person in particular? Does it require more than “ a memorandum or note in writing ” ?]

Still her solicitor was not then Mr. Franks's solicitor, and the memorandum was in the same position as if it remained in her own desk. There is no instance of a person being bound by such a communication. Moreover, that alleged agreement differs entirely in its terms from the underlease to Mr. Franks, which cannot therefore be held to be a performance of it.

* 102 * They referred to *Holland v. Eyre*; (a) Sugden on Vendors and Purchasers, p. 150; *Kennedy v. Lee*; (b) *Owen v. Thomas*; (c) *Morgan v. Holford*; (d) *Potter v. Sanders*. (e)

Mr. Malins and *Mr. W. D. Lewis* supported the appeal of Mrs. Fielding, and submitted that as an executrix she could not properly accept 550*l.* when by Mr. Franks's offer the property appeared worth 1000*l.*

Mr. Bacon and *Mr. Druce*, in support of the appeal of Mr. Franks, contended that at all events there was no equity against him. He had only accepted from Mrs. Fielding the performance by her of an agreement which was anterior to her agreement with the plaintiff. They cited *Dawson v. Ellis*, (g) *Courtney v. Williams*, (h) *Higgins v. Scott*, (i) *Smith v. Watson*. (k)

Mr. Daniel replied.

Judgment reserved.

May 9.

THE LORD JUSTICE KNIGHT BRUCE. — I consider the first question in this case to be whether, upon the supposition that Mrs. Fielding had not entered into any binding agreement respecting the prop-

(a) 2 Sim. & St. 194.

(d) 1 S. & G. 101.

(b) 3 Mer. 441.

(e) 6 Hare, 1.

(c) 3 M. & K. 353.

(g) 1 Jac. & W. 524; see also *Fuller v. Bennett*, 2 Hare, 394.

(h) 3 Hare, 539; 15 Law J., N. S., Ch. 204.

(i) 2 B. & Ad. 413.

(k) Bunbury, 55.

erty in dispute previously to the agreement of October, that agreement is one of which the specific performance ought to be enforced at the instance of the plaintiff. And this question can only, I think, be answered in the * affirmative, unless * 103 the 550*l.* on that occasion contracted for, was not then a fair and sufficient price for the property, sold as it was by Mrs. Fielding in the character of a trustee. My impression, however, is in favour of the fairness and sufficiency of the price of 550*l.*, which indeed upon the evidence there is no other ground for disputing than the increased price afterwards obtained from Mr. Franks, namely, 1000*l.* The motives, however, and circumstances under which he submitted to pay that sum are sufficient to prevent it from being a criterion of value; and though perhaps Mrs. Fielding would have been wrong if, previously to the agreement of October, she had made no endeavor at dealing with her neighbour, she is not open to the charge, for she had tried him and found him not willing to give more than 400*l.*; not willing indeed to give so much; for, though he had consented to that amount, it was after a struggle. It seems to me that Mrs. Fielding was uniformly desirous to get as much as she could, and that when she closed with Mr. Goodwin she thought, and had solid grounds for thinking, 400*l.* the utmost sum she could make of Mr. Franks. It was therefore in my opinion clearly not incumbent on her to apply to him again, or to give him notice before contracting with Mr. Goodwin. The price of 550*l.*, let it be remembered, was only for the leasehold property, independently of fixtures, of furniture, of utensils, and of stock, while for so much of those particulars as the additional 300*l.* covered I see not the least reason to suppose that price too small. On the whole, I conceive that not any person interested under the will of Mr. Fielding is or ever was entitled to complain of the contract of October, or to be dissatisfied with it on account of the price or otherwise, notwithstanding that, after it, and with the knowledge of it, Mr. Franks prevailed with himself to offer, and Mrs. Fielding with herself to accept, the 1000*l.* which * he is said to have parted with; my conviction * 104 being that she never would have obtained from him more than the 400*l.* if she had not, after bringing him so far, made a contract for an equal or a larger amount with some one else. I think that it would be wrong and mischievous to create or encourage such a notion as that a trustee for sale may avoid a fair and

an unobjectionable contract by entering into a subsequent contract for a higher price. The consideration of 550*l.* must stand or fall by its own merits, not by the result of any comparison with the 1000*l.*, and is in my judgment maintainable.

But all that I have hitherto said is, I repeat, on the supposition that, before the agreement of October, a contract binding on Mrs. Fielding, binding her in equity, I mean in her character of trustee under her husband's will, had not been made by her with Mr. Franks. And how does that matter stand? The agreement or alleged agreement of August, and the title of Mr. Franks under it, have upon the part of the plaintiff been assailed with more or less success or plausibility, on various grounds, of which I mean to give an opinion upon none, except in connection with a point raised against and not by the plaintiff. For the difference between the considerations to which a contract by a trustee for sale is liable, and those applicable to a contract by a vendor absolutely entitled for his own benefit to the produce of what he agrees to sell, was brought under the attention of the Vice-Chancellor and of ourselves by the plaintiff's adversaries or one of them. Mrs. Fielding was not solely interested in the produce of the property in controversy. She was a trustee for sale, but had no adviser in the transaction of August. The persons present at the bargain of the 10th (if that expression should be used) were herself single-

handed, and Mr. Franks, accompanied by two ladies of his
 * 105 family. It was not a business-like * transaction. Nor was there any record, note, or memorandum of it, unless so far (if at all) as Mrs. Fielding's letter of the following day to her solicitor can be so called. I assume that letter to be well in evidence against the plaintiff. I assume that it prevents all resort to the Statute of Frauds. I do not forget that she wrote it, apart probably from Mr. Franks, when very possibly nine or ten hours or more had passed subsequently to the interview of the 10th, and she had had time to reflect; still, without intending any imputation upon Mr. Franks, I must say that neither the agreement, if any, of the 10th, nor the letter of the 11th, nor the transaction compounded of the two, was, in my opinion, such in nature and circumstances as to be of any validity in equity against the testator's estate, otherwise at least than upon the condition of the price being equal or more than equal to the value.

The 400*l.*, however, was not merely the price of the leasehold

property. It extended also to other matters; namely, stoves, garden boxes, a marquee, seats, and fixtures. But independently of the personal chattels included, the evidence leads in my judgment unavoidably to the inference that, before and upon and continually after the 10th of August, the leasehold property alone, for which on that day, as Mr. Franks and Mrs. Fielding now say, he agreed to give and she to accept 400*l.*, or so much of that amount as ought to be referred to the leasehold property, was worth considerably more than 400*l.*, was worth, that is to say, above 500*l.*, upon a just and reasonable estimate, without taking into account the pressure to which Mr. Franks (from the particular convenience to him of the property) was capable of being subjected, — a process thought by so many persons to be perfectly consistent with their duty towards their neighbour, that, in moderation, it would perhaps be righteous *over much to blame, or not indeed *106 rather to expect it, in a trustee.

My opinion accordingly is, that if, after the month of September, there had been no dealing of any kind between Mrs. Fielding and the plaintiff, or between Mrs. Fielding and Mr. Franks, and he had, without any want of diligence, filed a bill against her for a specific performance of the agreement of August, submitting to take either an assignment or an underlease of the leasehold property, and proved in the suit all the documents and facts which are established by the evidence in this cause (so far as possible consistently with the assumed absence of the dealings after September with Mr. Goodwin and Mr. Franks respectively), the suit would have failed, and justly failed, if opposed by her upon the case which she had to adduce against it.

For these reasons, without entering more at large into the matter, I think the Vice-Chancellor's decree substantially right. It will be as well in point of form to vary it as to the declaration of Mr. Franks's deed being void and as to setting it aside. This no doubt the Vice-Chancellor himself would have done if asked. Mrs. Fielding must pay the plaintiff the costs of her appeal; not so, I think, Mr. Franks of his.

The Lord Justice TURNER, after stating the facts of the case, said that, as regarded Mrs. Fielding, the defence was that the agreement was made under circumstances involving surprise and undervalue, but that no sufficient proof of undervalue was before

the Court ; for the subsequent contract with Mr. Franks afforded no proof of undervalue under the circumstances of the case. If it were held to do so, every trustee might defeat an agreement
 * 107 by a subsequent one for a higher amount. In * support of Mr. Franks's appeal, Mrs. Fielding's letter to her solicitor had been relied upon. Assuming that the letter was a sufficient memorandum in writing, it did not prove such an agreement as this Court would enforce against a trustee. His Lordship doubted whether it contained a sufficient description of the property, for there were two leases, and the letter did not specify to which it referred.¹ In the next place, the letter contained these passages : " I fear I have not done so well as I ought ; " and (speaking of Mr. Franks), " He is so dreadfully sharp to deal with, that I thought it best to give you this information. " It might well be doubted whether such a memorandum could be enforced against a trustee, even assuming it to be sufficient to satisfy the provisions of the Statute of Frauds. But, independently of these considerations, the evidence proved that the agreement with Mr. Franks was entered into in such circumstances, and that the price agreed to be paid was such, that the Court never would have enforced the specific performance of that agreement. There was, moreover, Mr. Franks's own letter of the 2d of December, speaking of the plaintiff as having the property entirely in his power.

The alteration in the decree suggested by Lord Justice KNIGHT BRUCE was made, and Mrs. Fielding's appeal was dismissed with costs, Mr. Franks's appeal without costs.

* 108 * In the Matter of FINCH and SHEPHEARD,

Ex parte BARTON.

1853. May 3, 4, 9. Before the LORDS JUSTICES.

A mortgagor, without giving six months' notice, requested the mortgagee to accept payment and to transfer the mortgage. The transfer being executed,

¹ See *Ridgway v. Wharton*, 3 De G., M. & G. 697, and cases cited in note (1) ; *ante*, 90, note (2).

the mortgagee's solicitors refused to deliver it or the title-deeds to the mortgagor without payment of their bill of costs. The mortgagor's solicitor objected to items amounting to less than 9*l.* in all, but paid the full amount in order to obtain the deeds: *Held*, that the above were not such special circumstances as to subject the bill to taxation after payment.¹

Samble, that one of the special circumstances required is overcharge, and that an item objected to, not because the business was not done or because the charge was excessive, but because the liability to pay it is disputed, is not such an overcharge as to be sufficient ground for taxing a paid bill.

THIS was an appeal from an order of the Master of the Rolls, dismissing with costs a petition for the taxation of a bill of costs of the respondents, Messrs. Finch & Shephard, presented after payment of the bill. The hearing at the Rolls is reported in the 16th volume of Mr. Beavan's Reports, p. 585. The following statement of the facts of the case is taken from the judgment of the Lord Justice TURNER.

The petitioner, Anne Barton, was entitled to a leasehold estate, subject to a mortgage which had been transferred to John George King and Charles Shephard, who was one of the partners in the firm of Finch & Shephard. Messrs. Finch & Shephard acted as the solicitors of the mortgagees.

In the month of December, 1852, Mrs. Barton was desirous of having the mortgage transferred to a trustee for her. The draft of a deed of transfer of the mortgage to a Mr. Hayward, who appeared to have been a solicitor, was accordingly prepared, and perused and approved by Messrs. Finch & Shephard on behalf of the mortgagees, and the deed was engrossed and executed by the mortgagees. When the draft of the deed of transfer was left with Messrs. Finch & Shephard inquiry was *made as to the costs of the transfer, and Mr. Shephard *109 was told that they would be paid; but no allusion was made to any other costs. After the deed of transfer had been executed by the mortgagees, Messrs. Finch & Shephard, on Saturday the 18th of January, 1853, sent their bill of costs (amounting to 18*l.* 14*s.* 2*d.*), to Mr. Greatorex, the agent of Mr. Hayward, and an appointment was made for the 20th of January, 1853, to complete the business. The bill delivered included other costs (to the amount of between 6*l.* and 7*l.*), beyond the costs of the mere transfer. Early in the morning of the 20th of January, Mr.

¹ See *In re Rance*, 22 Beav. 177.

Hayward's clerk went to the office of Messrs. Finch & Shephard, and saw Mr. Shephard, and the amount of the principal and interest due upon the mortgage was then settled. Mr. Hayward's clerk then tendered to Shephard the amount due upon the mortgage, with 10*l.* for the costs of the transfer, and made some objections to the bill of costs. Mr. Shephard thereupon inquired of the clerk on whose behalf the tender was made, and was told by the clerk that it was made both on behalf of the petitioner Mrs. Barton (who was entitled to the equity of redemption) and of Mr. Hayward, in whose name the assignment was made. Mr. Shephard then received the amount tendered, and told the clerk that he received it on account of principal, interest, and costs; that if it was paid on account of the petitioner Mrs. Barton, he was entitled to six months' interest, in lieu of notice; and that if it was paid on account of Hayward, he was not bound to make the assignment unless his costs were paid. Mr. Shephard then refused to take less than the full amount of the costs, and retained the deeds claiming a lien for the balance. Afterwards, at a later hour of the same 20th of January, Mr. Hayward's clerk again went to the office of Messrs. Finch & Shephard, and paid the balance of the bill of costs, 8*l.* 14*s.*, without in terms

* 110 *repeating his objections to the bill; but he either then, or on his first going to the office of Messrs. Finch & Shephard, on the 20th of December, told Mr. Shephard that he should take such steps in consequence of Mr. Shephard's refusal as he might be advised.

Matters stood thus until the 15th of January, when Mr. Greatorex wrote to Messrs. Finch & Shephard, stating that he was instructed on Mrs. Barton's behalf to tax the bill, but proposing that they should refund the 8*l.* 14*s.*, and let the matter rest. On the 17th of January, Messrs. Finch & Shephard answered Mr. Greatorex's letter, refusing to reopen the matter, but at the same time offering to deliver a more detailed bill of costs if it was desired.

Under these circumstances the petition for taxation was presented to the Master of the Rolls on the 18th of February, 1853.

Mr. Cory, in support of the appeal. — There are three grounds on which the taxation ought to have been directed. First, the bill was paid under pressure, as the solicitors would not deliver

up the deeds unless their demands had been submitted to, and the six months' notice would have been insisted on, so that the transfer could not have been completed; secondly, there are several items not properly chargeable upon a transfer of a mortgage; and, thirdly, the payment was made under protest. It would be most unjust if a mortgagor could not repossess himself of his deeds at once, without thereby losing all right to tax an exorbitant bill. He referred to *Ex parte Wilkinson*, (a) *Re Tryon*, (b) *Re Wells*, (c) *Re Bennett*, (d) *Re Jones*, (e) *Re Elmslie*. (g)

**Mr. Roundell Palmer* and *Mr. Batten*, for the respondents, cited *Re Harrison*, (h) *Re Mash*, (i) *Re Browne*. (k) * 111

Mr. Cory replied.

Judgment reserved.

May 9.

THE LORD JUSTICE KNIGHT BRUCE. — This is the case of a petition for taxation of a bill of costs after payment, which the Master of the Rolls dismissed with costs. The total amount of the bill being between 18*l.* and 19*l.*, the payment is alleged to have taken place under pressure, and some items alleged to be objectionable are pointed out; but, though it is deposed that the petitioner was advised that some specified charges were not fair and proper, and advised that she was not liable to pay them, and something is sworn of a constant intention to pay what was fair and reasonable, I find not any statement, upon affidavit, which I can read, as being either formally or substantially a statement, even as to belief, that any one of the charges is unjust or improper, or would upon taxation be disallowed or diminished, nor upon the bill and the evidence do I see any ground for thinking it likely or even possible that taxation could reduce the bill to so low an amount as 10*l.*; in saying which I lay no stress against the petitioner on the offer made upon her part, before the quarrel had ripened into litigation. I am of opinion, therefore, clearly, that the whole matter in contest

(a) 2 Coll. 92.

(b) 7 Beav. 496.

(c) 8 Beav. 416.

(d) 8 Beav. 467.

(e) 8 Beav. 479.

(g) 12 Beav. 538.

(h) 10 Beav. 57.

(i) 15 Beav. 83.

(k) 15 Beav. 61; 1 De G., M. & G. 322.

here is not nor ever was so much as 9*l.*, and consequently, if the bill was too high, still the presentation of the original petition was necessarily an imprudent measure.

Not only, however, do I think it uncertain whether so
 * 112 * much as a sixth of the bill would on taxation be struck off, but I am not satisfied that the payment was made under what ought to be deemed, in the circumstances of the case, pressure. It was not made without professional intervention and professional assistance on the petitioner's part, though her solicitor or his clerk certainly objected to the amount expressly. The deeds were refused to be delivered unless on full payment. But the petitioner does not seem to have been in difficulties, or under any distress or embarrassment. She was paying off the mortgage, though the transaction, at her request, took the form of a transfer to a trustee for her; and there was a question reasonably or unreasonably raised, whether the mortgagees might not, even at the last or nearly at the last moment, insist on six months' notice or six months' interest, and decline making a transfer, keeping alive the debt on the whole.

If not too small and trifling a case, if not clear against the petitioner, this is at least too doubtful a case to render it proper for us, in my opinion, to disturb what the Master of the Rolls has done.

The Lord Justice TURNER, after stating the circumstances of the case as above detailed, said: It is to be observed, in the first place, that no case is made by this petition for the purpose of showing that the mortgagees were not entitled to the six months' interest in lieu of notice, which was claimed by Mr. Shephard, or that they were bound to transfer to Mr. Hayward upon any other terms; and the petitioner by the payment of the small amount of costs which is in question, has had at least the benefit of this right on the part of the mortgagees not being insisted upon. If she had
 not paid the 8*l.* 14*s.*, this right might have been insisted
 * 113 * upon, and, for all that appears on this petition, have been maintained by the mortgagees. The case, therefore, in this respect is by no means favourable to the petition. By payment of the bill she has secured to herself a benefit at the expense of the mortgagees, and she is now endeavouring to undo the payment by means of which she acquired the benefit.

It is further to be observed that this petition and the affidavits

by which it is supported are most guardedly prepared. It does not appear either from the petition or from the affidavits what was the objection taken by Mr. Hayward's clerk to the bill of costs, upon the 20th of December. From what does appear, I strongly suspect that his objection was, not that the costs in question were not due from the petitioner, or that the charges were unreasonable, but that they were not costs which the petitioner was bound to pay upon the transfer of the mortgage ; and if this was the objection, it was clearly wrong, as the mortgage was to be transferred in trust for the petitioner. What pretence was there for taking the deeds out of the hands of these solicitors, leaving any costs which were due to them by the petitioner unpaid ?

If it had been necessary to decide this case upon either of these points, I should have hesitated long before making an order for taxation ; but there is another point in the case, which appears to me to be decisive against the petitioner. Special circumstances are always necessary to found an order for the taxation of a bill after payment ; and it has been held, and in my opinion most properly held, in all the cases, that whatever other special circumstances may be required to ground the order for taxation after payment, there must at least be proof that * there are * 114 overcharges in the bill, whether amounting to fraud or not is not material to the present case. Now the allegation of this petition (and the affidavits in support of the petition follow the allegation) is simply this, that the items and charges which are complained of are not such as the petitioner was bound to pay upon the transfer of the mortgage, not that the business to which the items refer was not done, or that, if done, the charges for it were unreasonable ; and, so far from there being any proof of these essential circumstances, there is evidence, in opposition to the petition, that if a detailed bill had been made out, the charges would have exceeded the amount of the item particularly complained of.

In this state of circumstances I think it was the clear duty of the Court to refuse the order for taxation, and that this petition of appeal must therefore be dismissed.

THE SHREWSBURY AND BIRMINGHAM RAILWAY
COMPANY, Plaintiffs,

AND

THE LONDON AND NORTH-WESTERN RAILWAY COM-
PANY, THE SHROPSHIRE UNION RAILWAYS AND
CANAL COMPANY, GEORGE CARR GLYN, AND WIL-
LIAM COWAN, Defendants;

AND BETWEEN

THE LONDON AND NORTH-WESTERN RAILWAY COM-
PANY AND THE SHROPSHIRE UNION RAILWAYS AND
CANAL COMPANY, Plaintiffs,

AND

THE SHREWSBURY AND BIRMINGHAM RAILWAY COM-
PANY, Defendants.¹

* 1853. May 26, 27, 28, 30. June 1, 28. Before the LORDS JUSTICES.

A bill in Parliament to authorize a railway company to grant a lease in perpetuity to another railway company of certain projected lines was opposed by a third railway company, who withdrew their opposition on an agreement being come to that during the continuance of any lease to be authorized by the Act the companies should participate in portions of each other's profits, and that the two former companies should not take traffic on specified portions of their lines.

Held, differing from the opinion of Lord COTTENHAM on a demurrer (2 M. & G. 324), that the agreement was *ultra vires*, and ought not to be decreed to be specifically performed.²

Held, also, on the construction of the whole agreement, that if valid it would

¹ Affirmed, 6 H. L. Cas. 113. See 2 M'N. & G. 356 n. (1); 17 Q. B. 652; 16 Jur. 311; 21 L. J., Q. B. 89.

² See, as to acts in excess of corporate powers, *Taylor v. The Chichester and Midhurst Railway Co.*, L. R. 2 Ex. 356; L. R. 4 H. L. 628; 4 H. & C. 409; *The London, Brighton, and South Coast Railway Company v. The London and South-Western Railway Co.*, 4 De G. & J. 362, 389; 5 Jur. N. S. 801; *Gage v. New-Market Railway Co.*, 18 Q. B. 457; *Preston v. Liverpool, &c., Railway Co.*, 5 H. L. Cas. 605; *Macgregor v. Dover and Deal Railway Co.*, 18 Q. B. 618; *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R. 1 Eq. 593; 35 L. J. Ch. 156, 172; *Morris and Essex R.R. Co. v. Sussex R.R. Co.*, 5 C. E. Green (N.J.), 542; *Angell and Ames Corp.* (9th ed.) § 256; *Shrewsbury and Birmingham Railway Co. v. North-Western Railway Co.*, 6 H. L. Cas. 113;

have come into operation, although only a portion of the projected lines was completed.

The directors of a railway company are trustees (in an important sense of the word) of their statutory powers,¹ and an agreement entered into by the company amounting to a breach of trust will not be enforced to the prejudice, or not according to the views of all or some of the shareholders, at the instance of parties cognizant of the circumstances.²

The last of the foregoing propositions is not inconsistent with *Hawkes v. Eastern Counties Railway Company*, 1 De G., M. & G. 737.³

THIS was an appeal from the decision of the Master of the Rolls, made on the hearing of the above causes, and on a motion for an injunction which * had been ordered to stand * 116 over to the hearing of the causes.

The case is reported before the Master of the Rolls in the 16th volume of Mr. Beavan's Reports, p. 441. It is also reported upon the hearing of a demurrer and on a motion for an injunction in 2

Hawkes v. The Eastern Counties Railway Co., 1 De G., M. & G. 737, 760, and cases in notes; S. C., 5 H. L. Cas. 331; 1 Lindley Partn. (Eng. ed. 1860) 199; *The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 11 C. B. 775; *Bateman v. Mayor of Ashton*, 3 H. & N. 323; *Bagshaw v. Eastern Union Railway Co.*, 7 Hare, 114; 2 M'N. & G. 389, and cases in note; *Norwich v. The Norfolk Railway Co.*, 4 El. & Bl. 397; *Bostock v. The North Staffordshire Railway Co.*, 4 El. & Bl. 798; *Munt v. The Shrewsbury and Chester Railway Co.*, 13 Beav. 1; *Logan v. The Earl of Courtown*, 13 Beav. 32; *Scottish North-Eastern Railway Co. v. Stewart*, 3 Macq. 382; *Pennsylvania, &c., Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248; *Downing v. Mount Washington Road Co.*, 40 N. H. 230; *Strauss v. Eagle Ins. Co.*, 5 Ohio (N. S.), 39; *Green v. Seymour*, 3 Sandf. Ch. 285; *Baron v. Mississippi Ins. Co.*, 31 Mississippi, 116; *Abbott v. Baltimore, &c. Co.*, 1 Md. Ch. Dec. 542; *Buffett v. Troy and Boston R.R. Co.*, 40 N. Y. 168; 1 Dart V. & P. (4th Eng. ed.) 176; *Sugden V. & P.* (14th Eng. ed.) 76. As to the restraining of such acts by injunction, see 2 Dan. Ch. Pr. (4th Am. ed.) 1650, and cases cited in note (2); *King v. The Morris and Essex R.R. Co.*, 3 C. E. Green (N. J.), 397; *Del. and Rar. Canal and C. & A. R. & T. Co. v. Rar. and Del. Bay R. Co.*, 1 C. E. Green, 321, 378; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. Ap. 146.

¹ See 1 Lindley Partn. (Eng. ed. 1860) 493, 494; *Shrewsbury and Birmingham Railway Co. v. North-Western Railway Co.*, 6 H. L. Cas. 113; *Bennett's Case*, 18 Beav. 339; S. C., 5 De G., M. & G. 284; *Gregory v. Patchett*, 33 Beav. 595; *Benson v. Heathorn*, 1 Y. & C. C. C. 326; *York and North Mid. Railway Co. v. Hudson*, 16 Beav. 485; *Maxwell v. The Port Tennant Co.*, 24 Beav. 495; *Richardson v. Larpent*, 2 Y. & C. C. C. 507; *Harris v. The North Devon Railway Co.*, 20 Beav. 384; *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 482.

² See 2 Dart V. & P. (4th Eng. ed.) 957, 959, 963, and cases in notes.

³ S. C., 5 H. L. Cas. 331.

Macnaghten & Gordon, 324, and 3 Macnaghten & Gordon, 70, from which reports and the judgments the facts fully appear.

Mr. Rolt, Mr. Hardy, and Mr. Giffard supported the appeal, and contended, first, that the agreement had come into operation according to the true construction of it and of the Act, although the Shropshire Union lines had not been all completed. On this point their arguments were in substance the same as had been successfully urged on the appeal before Lord COTTENHAM from the decision of the Vice-Chancellor of England, who had allowed a demurrer to the bill. (a)

They also contended that there was nothing in the agreement contrary to public policy, or the duty of the directors of the companies, or beyond the powers conferred on the directors by the companies' Acts.

They further argued that both these points had been in fact decided by Lord COTTENHAM when he overruled the demurrer.

The Solicitor-General, Mr. Roundell Palmer, Mr. Follett, Mr. W. M. James, and Mr. J. V. Prior, for the London and North-Western Railway Company, contended, that the agreement had not come into operation; that it was legally or equitably invalid, as contrary to public policy, and beyond the powers of the
* 117 directors, * a company having no authority to delegate to another any part of its duties; that, if properly construed, no violation of it had taken place; that the plaintiffs had so conducted themselves as not to be entitled to ask the interposition of the Court; and that the plaintiffs had entered into contracts with companies competing with the defendants of such a kind as to prevent the plaintiffs from fulfilling their part of the agreement.

Mr. Willcock and Mr. Chapman, for the Shropshire Union Railway Company, supported the same view.

Mr. Rolt, in reply.

The following cases were cited: *Attorney-General v. Wil-*

(a) See 2 M. & G. 338.

son, (a) *Cohen v. Wilkinson*, (b) *Webb v. Direct London and Portsmouth Railway Company*, (c) *Lord James Stuart v. London and North-Western Railway Company*, (d) *Hawkes v. Eastern Counties Railway Company*, (e) *Natusch v. Irving*, (g) *Great Northern Railway Company v. Eastern Counties Railway Company*, (h) *East Anglian Railway Company v. Eastern Counties Railway Company*, (i) *McGregor v. Official Manager of Dover and Deal Railway Company*, (k) *Gage v. Newmarket Railway Company*, (l) *Simpson v. Denison*, (m) *South Yorkshire Railway and River Dun Company v. Great Northern Railway Company*. (n)

Judgment reserved.

1858. June 28.

* THE LORD JUSTICE KNIGHT BRUCE. — In these appeals I * 118 think it convenient first to disembarass the case of the petition of the cross appellants; that, namely, of the London and North-Western Railway Company, who are defendants in one and plaintiffs in the other two of the three bills before the Court. The two last bills were cross bills, and were substantially, I agree with the leading counsel of the cross appellants in thinking, a defence, effectual or ineffectual, necessary or unnecessary, but still a defence merely against the first bill. If any notion of the possibility of obtaining any relief under both or either of the cross bills beyond the dismissal of the bill of the original plaintiffs has at any time existed, it was, as I conceive, utterly unreasonable. Now there is but one order under appeal. It is intituled in the three suits, dismisses all the bills, and refuses to make an order on a motion which came before the Court simultaneously with the hearing of the causes. The earlier petition of appeal, that of the original plaintiffs, is properly intituled in each of the three. The other petition is intituled only in one, and that the second cause, and appears to complain merely of the dismissal of the earlier cross bill.

The order under appeal notices of course the pleadings in all

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| (a) Cr. & Ph. 1. | (h) 9 Hare, 306. |
| (b) 1 M. & G. 481; 1 H. & T. 554. | (i) 7 Railw. Ca. 150. |
| (c) 1 De G., M. & G. 521. | (k) 7 Railw. Ca. 227. |
| (d) <i>Ib.</i> 721. | (l) 16 Jur. 1136. |
| (e) <i>Ib.</i> 737. | (m) 10 Hare, 51. |
| (g) <i>Gow, on Partnership</i> , App. 398. | (n) 8 De G., M. & G. 576. |

the causes, notices the proofs taken in the causes, and, I believe, all the affidavits and exhibits. The cross bills having been merely in effect what I have stated, the whole of the bills having been dismissed without costs, the cross petition of appeal not complaining that the original plaintiffs' bill was not dismissed with costs, and all the materials in the three causes being materials which would have been open to the full use of the cross appellants as respondents to the original appeal, without the cross appeal, I can see

neither apology nor excuse for the latter; I think, consequently, * 119 that the appeal of the cross appellants should be dismissed with costs.

This leaves of course untouched the question of the propriety or impropriety, the merits or demerits, of the original plaintiffs' petition of appeal, to which I proceed to address myself, and the observations that I shall make are to be understood as confined to that petition.

Among the various points — some, if not all of them, difficult, some, if not all, of importance — that were raised and discussed during the argument, there are several as to which, considering it unnecessary to express, I do not mean to express, any opinion. One of these is the question of the true interpretation of the Act of 1847, intituled, "An Act to Authorize a Lease of the Undertaking of the Shropshire Union Railways and Canal Company to the London and North-Western Railway Company;" one other, the question of the correct construction of the contract of October, 1847. I assume for every purpose of the present litigation (though, I repeat, without intimating whether it is in fact my opinion), that both instruments (the Act and the contract) ought to be read and construed as the original plaintiffs insist that they ought to be read and construed. In the same way I assume in the original plaintiffs' favour, that the question of the validity of the instrument of October, 1847, at law — its validity, I mean, in a sense strictly and merely legal — is at present immaterial; that is to say, may, without damaging or prejudicing the Shrewsbury and Birmingham Railway Company in this litigation, be viewed as one upon which an action is maintainable or is not maintainable. All this leaves still open to controversy the question whether the contracts of

October and May, 1847, are, or either of them is, such as a * 120 Court of Equity ought to enforce against the London * and North-Western Railway Company at the instance of the

original plaintiffs, either wholly or in part; and no injustice will, I think, be done to either side by considering the whole dispute here as reduced substantially to that point. Now, the contract of October, 1847, is under the seal of the London and North-Western Railway Company, and must be regarded everywhere as the deed of that corporation. But not every deed executed by a corporation is enforceable against it in equity, or even at law. The deed of corporation may be *ultra vires*, and so ineffectual, though not in any other sense illegal.¹ And in a Court of Equity at least the manner of entering into the agreement intended to be carried into execution by the deed, the character and position of the persons by whom the agreement was made, its circumstances, and the authority and direction under which the common seal was affixed, may all be material upon a question whether the deed shall have effect given to it. The deed in dispute here had the common seal of the London and North-Western Railway Company affixed to it by the order and authority of its directors, that is, the delegated managers of its affairs, who caused this to be done for the purpose of carrying into effect by the deed an agreement which they had taken upon themselves as on behalf of the company. But the directors of a company such as the London and North-Western Railway Company are, in a sense, in no unimportant sense, trustees of their functions and powers for the shareholders, and perhaps also for society at large; certainly, however, for the shareholders; and if directors thus circumstanced enter into a contract amounting to a breach of trust as between themselves and those for whom they are trustees, it would be contrary to the principles and practice of this jurisdiction to be active in enforcing it in a manner possibly prejudicial to the interests or not agreeable to the views of all or some of * the *cestuis que trustent*, at the instance of persons cog- * 121 nizant throughout and from the beginning of the true nature, character, and circumstances of the agreement.

¹ PARKE B. in the *South Yorkshire Railway and River Dun Co. v. The Great Northern Railway Co.*, 9 Exch. 55, 84, 85; *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C. B. 775; *MacGregor v. Dover and Deal Railway Co.*, 18 Q. B. 618; *Bagshaw v. Eastern Union Railway Co.*, 7 Hare, 114; 2 M'N. & G. 389, and cases in note; *Bateman v. Mayor of Ashton*, 3 H. & N. 323; *Norwich v. Norfolk Railway Co.*, 4 El. & Bl. 397; *Angell and Ames Corp.* (9th ed.) § 256.

The original plaintiffs must, I think, for every purpose now material, be taken to have been throughout and from the beginning cognizant of the true nature, character, and circumstances of the contracts of May and October, 1847. Did, then, each or either document amount to a breach of trust as between the directors of the London and North-Western Railway Company and those for whom they were trustees? Was it as between them justifiable and proper conduct in the directors to affix the common seal of the company to such an instrument as that of October, or enter into such an agreement as that of May? This is a question which of course cannot be answered without considering the effect of each if valid. What was the effect of each if valid? The effect was, I apprehend, to create a partnership, determinable only at the option of the Shrewsbury and Birmingham Railway Company, but otherwise permanent, between that company and the London and North-Western Railway Company,—a partnership possibly of a particular and limited kind, but still a partnership. The effect was materially to interfere with and vary the rights of the latter company, and necessarily therefore of its shareholders, in respect of a portion very far from merely nominal of the gross receipts of their business and property. It was to divert so much of the funds of the company properly applicable for the purposes of their current expenses and of dividends into a different, an irregular, and an illegitimate channel. It was to give up six or seven thirteenths of the gross receipts of no inconsiderable portion of their business to another company, in exchange for an uncertain amount of money, an amount that might possibly

* 122 * be an equivalent—possibly more than an equivalent, but possibly less—in exchange, namely, for six or seven thirteenths of the gross receipts of the business, or a great part of the business, of that other company on the whole or a portion of a railway of its own. How could such a bargain as this be within the proper functions of either set of directors? Whatever their intentions and belief in point of fact, they must, for every purpose of such litigation as the present, be taken to have entered into the contract of October, as well as the agreement of the preceding May, with knowledge that they were on each side committing and participating in a breach of trust; dealing, that is, with the property and rights of others confided to their care and management in a manner exceeding the authority given, and departing from the

confidence reposed. I think therefore, that, whether the whole or any part of the agreement of May is legally valid or legally invalid, and whether the contract of October is legally valid or legally invalid, wholly or in part, this Court ought not to lend its assistance to enforce or act upon the first clause of the agreement of May, or the first or second clause of the agreement of October.

With regard to the third clause of the contract of October and the second clause of the agreement of May, these parts of the two instruments are perhaps absolutely invalid on more than one ground. But, however this may be, I think that the other portions of both documents, those which according to my opinion, already stated, cannot here be enforced or acted upon, are too important and considerable with reference to the whole to render it in my judgment fit to enforce or act upon either document to any extent whatever in this litigation. The parties must be left to law. But I think their cases not such as to render it right to dismiss the * original petition of appeal with costs. It ought, I con- * 123
ceive, to be dismissed without costs, and with a return of the deposit to the original plaintiffs. If, however, on either side any direction from us shall be desired respecting the action brought in consequence of Lord TRURO's order, we are ready to hear and consider any suggestion upon that subject. I may add a word as to the authorities. If it were necessary for me to mention any, I should specify *Mortlock v. Buller*, (a) *Turner* 1. *Harvey*, (b) *Bridger v. Rice*, (c) *The Charitable Corporation v. Sutton*, (d) *Natusch v. Irving*, (e) *Attorney-General v. Wilson*, (g) *Cohen v. Wilkinson*, (h) *East Anglian Railway Company v. Eastern Counties Railway Company*, (i) and *Mr. McGregor's Case*, (k) as decided in the Exchequer Chamber. Some at least of these were cited at the bar. Of *Mr. Hawkes's Case*, (l) also mentioned more than once during the argument, I will only say that I thought Lord ST. LEONARDS right in affirming my decision in that cause, and that I still adhere entirely to what I did there. From which neither when concurring with Lord CRANWORTH in deciding the

(a) 10 Ves. 292.

(b) Jac. 169.

(c) 1 J. & W. 74.

(d) 2 Atk. 400.

(e) Gow, on Partnership, App.^l 398.

(l) 3 De G. & Sm. 743; 1 De G., M. & G. 787.

(g) 1 Cr. & Ph. 1.

(h) 1 M. & G. 481.

(i) 7 Railw. Ca. 150.

(k) 7 Railw. Ca. 227.

cases of *Mr. Webb* (a) and *Lord James Stuart* (b), nor at any other time, have I intended to depart, or as I believe departed, in the slightest degree.

THE LORD JUSTICE TURNER. — The first of these suits is instituted by the Shrewsbury and Birmingham Railway Company against the London and North-Western Railway Company * 124 and the Shropshire * Union Railways and Canal Company and their officers, for the purpose of enforcing an agreement entered into between the three companies with reference to two distinct subjects, — first, the moneys to be received by the companies respectively for the carriage of passengers and goods from and to the places mentioned in the agreement; and, secondly, the use to be made by the two companies, who are defendants, of certain parts of their lines of railway.

In order clearly to understand the agreement in question, it is necessary, I think, in the first instance, to advert to the position of these several companies in the early part of the year 1847. The London and North-Western Railway Company had at that time a line of railway from London through Rugby to Birmingham, and thence northward through Stafford, Crewe, Warrington, and Newton to Liverpool, and on this line they had a station at Wednesfield, near Wolverhampton. They had also a branch line from Crewe to Chester, and had power to take a lease, which has since been granted to them, of the Trent Valley Line (then in the course of formation), and running from Stafford through Tamworth to Rugby.

The Shrewsbury and Birmingham Railway Company had at that time under their Act of Parliament, which was passed in the year 1846, power to make a line from Shrewsbury through Wellington to Wolverhampton, and had also running powers over the Stour Valley line, which was authorized to be made by an Act also passed in the year 1846, and which runs from Birmingham through Wolverhampton to Bushbury, a point on the line of the London and North-Western Railway a little to the north of Wednesfield; but the termination of the line of the Shrewsbury and Birmingham Railway Company * 125 at Wolverhampton was not in connection with the station of the London and North-

(a) 1 De G., M. & G. 521.

(b) *Ib.* 721.

Western Company at Wednesfield, nor was the termination of the Stour Valley line at Birmingham in connection with the London and North-Western line at that place.

The Shropshire Union Railways and Canal Company in the early part of the year 1847 had, under three several Acts passed in the year 1846, power to make three distinct lines: the first from Shrewsbury through Wellington to Stafford; the second from a point on the Chester and Crewe Branch of the London and North-Western line to a point on the Shrewsbury and Birmingham line, a little above Wolverhampton; and the third from Newton to Crewe. The first of these three lines, the Shrewsbury and Stafford, was from Shrewsbury to Wellington Common to the Shrewsbury and Birmingham and the Shropshire Union Companies; and the Acts of the two companies provided for the management of this part of the line by a joint committee, and for the joint user of it by the two companies. The second of these three lines (the line from the Chester and Crewe Branch of the London and North-Western line to the Shrewsbury and Birmingham line) was to cross the Shrewsbury and Stafford line at a place called Gnosal, but neither this line nor the third line of the Shropshire Union Company (the Newton and Crewe line) has yet been made.

As the lines of these railways were laid out, therefore, the London and North-Western lines were accessible to the Shrewsbury and Birmingham Company at Bushbury by passing up the Stour Valley line to that place, and to the Shropshire Union Company at Stafford, but neither of these companies had any other means of railway conveyance to Rugby on the south of Rugby. There were, * however, canals at Wolverhampton by which goods * 126 coming along the Shrewsbury and Birmingham line might be conveyed to the south, and there was of course the prospect of other lines of railway from the south becoming connected with the Shrewsbury and Birmingham line. The lines of these railways, as laid out, also afforded to the Shropshire Union Company the means of carrying passengers and goods both from Shrewsbury to Gnosal, and thence down their second line to the Shrewsbury and Birmingham line near Wolverhampton, and from Shrewsbury to Stafford, and thence down the London and North-Western line to Bushbury and Wolverhampton and to Wednesfield.

Thus matters stood in the early part of the year 1847, and in that year the London and North-Western Company obtained an

Act of Parliament enabling them to take a lease of the Stour Valley line, which has since been granted to them; and they then or afterwards also obtained another Act for making a line from the termination of the Stour Valley line at Birmingham to their original station at that place, thus connecting the Stour Valley and London and North-Western lines at Birmingham. The London and North-Western Company also in the same year, 1847, applied to Parliament for another Act to enable them to take a lease of the Shropshire Union Railways. This latter Act was opposed by the plaintiffs, the Shrewsbury and Birmingham Railway Company, and the opposition led to an agreement between the companies, which was dated the 13th of May, 1847, and was as follows:—

“First. That all traffic up and down between Shrewsbury or Wellington or intermediate stations and Rugby or any point on the London and North-Western line to the south of Rugby * 127 shall be kept separate and divided * between the two companies, in the proportion to the mileage travelled over each of the lines of the Shrewsbury and Birmingham and Shropshire Union Companies, such joint account and division, however, to be optional to the Shrewsbury and Birmingham, this arrangement to include all the London traffic by whatever route it may pass. Secondly. That the Shropshire Union or the London and North-Western Company shall not, during the continuance of such joint account and division of traffic, convey from Wellington or any part of their line westward of Wellington any goods or passengers to any part of the Shrewsbury and Birmingham line east of the same place, or be in any way entitled to participate in such traffic. Thirdly. The three directors forming and to form the joint committee for the management of the Shrewsbury and Wellington line shall at no time be directors of the London and North-Western Company. Fourthly. An agreement to be forthwith prepared for carrying out the arrangement, and any question as to the construction of the terms to be left to Mr. Robert Stephenson.”

Upon the footing of this agreement the plaintiffs, the Shrewsbury and Birmingham Company, withdrew their opposition to the bill for enabling the London and North-Western Company to take the lease of the Shropshire Union lines, and the leasing Act accordingly passed.

[His Lordship stated the substance of its provisions, for which see 2 Macnaghten & Gordon, pp. 329, 339, note (a).]

Before this Act was passed a more extended agreement for carrying out the arrangement of May, 1847, was in the course of preparation between the parties, but it was not completed until after the Act was past; * when completed, it was put under *128 the seal of the respective companies, and bore date the 12th of October, 1847, and was as follows:—

[His Lordship read it. See the agreement set out 2 Macnaghten & Gordon, 331 to 335.]

The agreement being thus perfected, the plaintiffs (the Shrewsbury and Birmingham Railway Company) proceeded to complete their line, and it was completed in the month of November, 1849. Upon their line being opened, they called upon the London and North-Western Railway Company to keep the accounts stipulated for by the agreement, and the London and North-Western Company having refused to do so, and having commenced carrying passengers and goods contrary to the provisions of the third clause of the agreement, the bill in the first suit was filed.

This bill was met by a demurrer on the part of the London and North-Western Company, and the demurrer was allowed by the late Vice-Chancellor of England upon the ground that the agreement had not come into operation. There was an appeal from the order allowing the demurrer, and Lord COTTENHAM, before whom the appeal was heard, overruled the demurrer, his opinion being that the agreement had come into operation and was valid and binding. (a) Upon the demurrer being overruled, a motion for the injunction prayed by the bill was made before the late Vice-Chancellor of England, and was granted by him, but the order granting it was also appealed from, and Lord TRURO, before whom the appeal was heard, dissolved the injunction. His Lordship, however, took this course, as I collect from his judgment, solely upon the ground of comparative inconvenience, and intimated *no opinion upon the merits of the case, consider- *129 ing that the questions both as to the agreement having

(a) See 2 M. & G. 342.

come into operation, and as to its legal validity, ought to be tried at law. (a)

An action was thereupon brought upon the agreement, and in this action the Court of Queen's Bench has, as it is said, intimated an opinion in favour of the validity of the agreement.

A further motion for the injunction was then made before the Master of the Rolls, to whom the cause was transferred, but the motion was ordered to stand until the hearing of the cause, and ultimately the cause was heard before his Honor, who dismissed the bill. (b) From this order of dismissal the first of these appeals is brought, and the question therefore which we have to decide is whether this bill has been properly dismissed. The agreement being under the seal of the three companies, the plaintiffs are of course *prima facie* entitled to specific performance. It rests upon the defendants, therefore, to displace that right. They have succeeded in doing so in the Court below, upon the ground that the agreement has not yet come into operation, and I will first, therefore, examine that question.

The question, as it seems to me, depends upon the true meaning to be attributed to the words "during the continuance of any such lease authorized to be granted by such Act," which are contained in the first clause of the agreement. It is to be observed that the words are during the continuance of any such lease, not during the continuance of the lease, and from this form of expression it is, I

think, to be collected that the parties had in contemplation * 130 that there might be some lease other than * the lease in perpetuity, which is first mentioned in the agreement. The words "during the continuance of any such lease" could hardly be intended to refer solely and exclusively to a lease which, if granted, was to endure for ever. To what, then, do those words refer? This, I think, is to be gathered from the recitals of the agreement. The agreement recites that the covenants were to be entered into upon an Act of Parliament being obtained for authorizing such lease as aforesaid, that is, a lease in perpetuity of the undertaking, or a lease between the same parties of any part of the said undertaking between Shrewsbury and Stafford; and although I agree that the extent of the covenants cannot be measured by the event upon which they were to be entered into, I think that the recitals of the

(a) See 3 M. & G. 70.

(b) 16 Beav. 441.

agreement must be referred to for the purpose of explaining the meaning of the referential term "such," and I think that upon the true construction of this agreement that word "such" has reference to the recital which I have mentioned, and the covenant must be read as if the words had been during the continuance of any lease in perpetuity of the undertaking, or of any lease between the same parties of any part of the said undertaking between Shrewsbury and Stafford. That the parties contemplated that there might be a lease of the part of the undertaking between Shrewsbury and Stafford before the lease of the entire undertaking is evident from the mention of such a lease in this recital. If they had considered that the Act which had then passed and was before them warranted no lease except a lease of the entire undertaking, why was any mention made of any lease of the part between Shrewsbury and Stafford? But when we have surmounted this difficulty and have settled that the covenant is to be read during the continuance of any lease in perpetuity of the entire undertaking, or of any lease between the same parties of any part of the undertaking between Shrewsbury and * Stafford, authorized * 131 to be granted by such Act, a further question arises,—What is the meaning of these latter words "authorized to be granted by such Act"? Do they mean during the continuance of any such lease as Parliament has in express terms enacted may be granted, or do they mean during the continuance of any lease which may be granted consistently with the provisions of the Act? The latter, I think, is the true meaning, for the parties, as I have before observed, contemplated that there might be a lease of part. It is said, however, that Parliament has by the Act expressly negatived the granting of any lease except upon conditions which have not been fulfilled, and the thirty-first section is relied upon in support of that position; but I think this section does not bear out the argument in support of which it is adduced. That section, as I understand it, refers to the lease of the whole undertaking, and seems to me to have been inserted to meet the words, "or at such earlier period as may be agreed upon," which are contained in the first section, and the thirty-first section being thus removed out of the way, I think that the earlier sections of the Act having prescribed the terms on which the London and North-Western Company were to hold each of the lines when completed and opened, and the rents which they were to pay for the same, a lease of any

one of the lines when completed and opened might well be granted, and would be consistent with the provisions of the Act. The conclusion at which I have arrived on this part of the case is, I think, much strengthened by reference to the agreement of May, for that agreement which it was intended to carry out by the agreement in question refers to the traffic being carried, without any mention of any lease being granted, and thus shows that what the parties were looking to throughout was the power of carrying along the line

which would certainly arise upon the Shrewsbury and Stafford line being completed. For these * reasons I feel myself

* 132 reluctantly compelled to differ from the Master of the Rolls upon the point on which he has dismissed this bill, but I do so with less reluctance as he has himself differed from Lord COTTENHAM upon that point, and my opinion upon it coincides with that of Lord COTTENHAM. If this case had rested upon the single point of whether the agreement had come into operation, I should have thought the plaintiffs entitled to relief, but a further point was urged on the part of the defendants, that this agreement ought not to be enforced upon grounds of public policy, and I proceed therefore to consider that question.

In determining questions of this nature, Courts of justice, as I apprehend, are bound to consider not what in their judgment may be most for the interest of the public, but what was the scope and object of the law which is said to be infringed or attempted to be infringed. What we have here to consider, therefore, is what was the scope and object of the Acts of Parliament from which these companies and other railway companies, for there is nothing in this respect peculiar to these companies, derive their powers. The great undertakings of these companies could not be carried out by private enterprise, and Parliament has therefore with a view to the public good authorized the constitution of large bodies acting by directors for the purpose of carrying them out; but these bodies have no existence independent of the Acts which create them, and they are created by Parliament with special and limited powers and for limited purposes. Whether Parliament has wisely limited their power or the purposes of their incorporation is not for us to consider. The fact of their being endued with such powers, and incorporated for such purposes, only shows that Parliament did not

think fit to intrust them with more extended powers, or * 133 * to incorporate them for other purposes; and when,

therefore, they exceed or attempt to exceed their powers, or to go beyond the limits of their incorporation, they are acting in contravention of the law which created them, and in opposition to what Courts of justice are bound to consider to have been the object of Parliament in their creation. Again, Parliament has given these companies powers to interfere with private property, and has empowered them to levy tolls, and it has protected the public against any undue interference on their part with private property, and has secured to the public the benefit of their expenditure by limiting and restricting their powers; and how is it consistent with the protection thus thrown around the public by Parliament that they should be permitted to transgress the limits which Parliament has thus imposed for the public security?

These are the principles or some of the principles which, as I think, must be applied to this case, considered with reference to the question of public policy; and I will now consider what is the effect of the agreement which has been entered into between these parties, and whether it contravenes those principles. The effect of this agreement, as I understand it, is, that the Shrewsbury and Birmingham Company are to receive seven-thirteenths of what shall be determined by auditors to be the due proportion of the whole moneys received by the London and North-Western Company for the carriage of any passengers or goods from Shrewsbury or Wellington, or any intermediate place, to Rugby or to the south of Rugby, which is attributable to the distance from the point of departure to Stafford, and that the London and North-Western Company are, on the other hand, to receive six-thirteenths of what shall be determined by auditors to be the due proportion of the whole * moneys received by the Shrewsbury and Bir- * 134 mingham Company for the carriage of any passengers or goods from Shrewsbury or Wellington, or any intermediate place, to Rugby or the south of Rugby, which is attributable to the distance from the point of departure to Wolverhampton, and, applying to this agreement the principles to which I have referred, it must be asked where are the powers of the companies to enter into such an arrangement?

It cannot, I think, be denied that they could not alienate the whole of their tolls; upon what principle then can they alienate the tolls on a given portion of their line, or any portion of such tolls? It is said that this is merely a matter of arrangement; but

it is not less an alienation because it is a matter of arrangement.¹

Again, these companies are incorporated with reference to the carriage of passengers and goods between particular places; where is their power to contract for an interest in the carriage of passengers and goods between other places? It was urged indeed on the part of the appellants that these companies were not bound to be carriers at all, but that circumstance does not appear to me to help the argument, for this agreement proceeds upon the assumption of both parties being carriers, and even if it did not, I see nothing in the circumstance of the parties not being bound to carry which could warrant their entering into such an arrangement as this.

It was then said, however, that although these considerations might affect the question as to what has been termed the through traffic, the subject of the first and second clauses of the agreement, they could not apply to what has been called the local traffic the subject of the third clause of the agreement; but I think

* 135 * this argument will not avail the appellants. Assuming that these companies are not bound to be carriers, I very much doubt whether, being carriers, they can legally stipulate that they will not carry between particular places on their lines; but even assuming that they can, I think that this agreement, being in other respects obnoxious to public policy, cannot be enforced in this respect.

Much stress was laid in the argument upon the circumstance of the respondents having obtained the consideration for the agreement by the withdrawal of the opposition to the bill; but when this Court refuses to interfere upon principles of public policy, it acts with reference to the interests of the public, and not with reference to the conduct of individuals, and I do not think, therefore, that we should be justified in relieving the appellants upon this particular ground. The appellants, when they agreed upon terms to withdraw their opposition to the leasing bill, should

¹ See, as to the power of corporations to alienate their corporate franchise, *Eldridge v. Smith*, 34 Vt. 484; *Richardson v. Sibley*, 11 Allen, 65; *Commonwealth v. Smith*, 10 Allen, 448; *Angell and Ames Corp.* (9th ed.) § 191; *Pierce v. Emery*, 32 N. H. 486; *Howe v. Freeman*, 14 Gray, 566; *Atkinson v. Marietta, &c., R.R. Co.*, 15 Ohio St. 21; *Miller v. Rutland, &c., R.R. Co.*, 86 Vt. 452.

have taken care that the terms were not such as to infringe the law.

Great reliance was also placed in the argument upon the opinions of Lord COTTENHAM, and as it was said of the Court of Queen's Bench in favour of the validity of this agreement, but the cases upon this subject have taken a much wider range since Lord COTTENHAM's opinion was pronounced, and I have not been able to satisfy my mind that in the intricacy of the pleadings at law this particular question was fairly submitted to the consideration of the Court of Queen's Bench. At all events, the other cases which were cited in the argument seem to me to be at variance with the opinion said to have been expressed by the Court of Queen's Bench; and upon the principle of those other cases, and for the reasons which I have given, I am satisfied that, looking * at this case with reference to the question of public * 136 policy, this Court ought not to decree a specific performance of this agreement, or to grant the relief which is prayed by this bill.

It is unnecessary for me, therefore, to enter into the other grounds of defence which were urged on the part of the respondents, the more as I do not think they furnish any substantial answer to the appellants' case. My opinion is that this bill must be dismissed, but without costs.

The bill being dismissed, the motion must of course be dismissed also, and it remains then only to consider the appeal by the London and North-Western Company in the second cause. On this head I have little to add to what has been said by my learned brother. Without reference to any other question affecting the agreement sought to be enforced in this second cause than the circumstances under which it was entered into, I think that a specific performance of it ought not to be decreed. It was attempted to justify this appeal upon some supposed necessity for presenting it, in order to bring forward the facts as a defence to the other suit, but I do not think that the appeal was necessary for any such purpose even if it could be used for the purpose, which I doubt, as it is presented in the second suit only. I concur therefore in opinion that the appeal in the second cause should be dismissed with costs.

* 137 * HARRISON v. THE MAYOR, ALDERMEN, AND
BURGESSES OF THE TOWN OF SOUTHAMPTON
AND OTHERS.

1853. June 2, 8, 13. Before the LORDS JUSTICES.

On a question of legitimacy there were in evidence a sentence of nullity of a marriage of a minor for want of her father's consent, and a statement in the parish register that the marriage took place by license with the consent of the mother of the bride, but saying nothing as to the father's consent. There was, however, evidence leading to the conclusion that the sentence had been obtained by collusion between the husband and wife, and that the father had been aware and did not disapprove of the match: *Held*, fifty years after the date of the sentence of nullity, that the marriage ought to be presumed valid.

THIS was an appeal from an order of Vice-Chancellor STUART, overruling exceptions to the Master's report.

By the order made on the hearing, on the 31st of January, 1851, it was referred to the Master to inquire who, at the time of the death of Henry Robinson Hartley (the testator in the cause), were his heir-at-law and next of kin.

Under this reference the appellants, William Roofe and Sarah Ann his wife, adduced evidence to prove that Mrs. Roofe was such heir-at-law and next of kin.

The Master, by a separate report dated the 9th of June, 1852, found that Ann Sarah or Sarah Ann Roofe claimed to be the daughter of the testator Henry Robinson Hartley, by Celia Ann, otherwise Ann Celia his wife, whose maiden name was stated to be Celia Ann or Ann Celia Crowcher, and as such to be sole heiress-at-law and next of kin of the testator. But he found that the testator Henry Robinson Hartley and his alleged wife were never legally married; for that Celia Ann or Ann Celia Crowcher was, at the time of the alleged marriage, an infant under the age

* 138 of twenty-one * years, and that such alleged marriage was performed by license, and without proper consent on behalf of the father or guardian of Celia Ann or Ann Celia Crowcher, pursuant to the provisions of the Act of Parliament in that case provided. And the Master also found that such alleged marriage was, pursuant to a sentence or decree of the Consistory Court of the Bishop of Winchester, bearing date the 25th of June, 1802,

pronounced or declared to be null and void. He therefore found that Sarah Ann Roofe was not, at the time of the death of the testator, Henry Robinson Hartley, and was not then the heiress-at-law or next of kin of the testator according to the Statutes of Distribution.

To this report the appellants excepted, and relied upon evidence which they had adduced before the Master, to show that the sentence of the Consistory Court of Winchester, declaring the marriage null and void, was obtained by fraud and collusion. The following were the material parts of the evidence adduced before the Master.

The register of the marriage was as follows: "The year 1798. Henry Hartley, bachelor, and Celia Ann Crowcher, a minor, both of this parish, were married in this church by license, with the consent of her mother, this 24th day of November, 1798, by me, Ebn. Evans, Curate. This marriage was solemnized between us, Henry Hartley, Celia Ann Crowcher, in the presence of Jemima Butler, Richard Gudge."

A sister of Mrs. Hartley, named Elizabeth Froggett, of Portsea, widow, on her examination *vivâ voce* before the Master, deposed as follows: "I am 78. My parents were James Crowcher and Elizabeth his wife. My mother's father was Captain Charles Wimbledon. * My mother derived property from him; part * 139 of the property was Mussell's Farm, at Tichfield. My mother married her own servant, James Crowcher. My father followed a farm after the marriage; many years after, he became a sailor. My mother's marriage with my father turned out an unhappy one. There was very little else than cause of complaint through his life, through his drinking. I remember my mother living in Union Street, Portsea, in 1798: her husband, James Crowcher, at that time belonged to the sea, I think the *Staunch*. I knew he belonged to a vessel called the *Staunch*, a Government vessel, and he died in it. My parents had another daughter named Celia Ann. She was living with my mother in this house in Union Street. My mother and father did not live together. There had been very great differences between them before that time. When my father came on shore he went to his sister's, a Mrs. Cator. She lived in the Old Rope Walk, a very little way from Union Street, — fifty yards. My sister before the marriage was in the habit of visiting my father at her aunt's, Mrs. Cator's. I came to my

mother's house about September, 1798, and was there about five months, rather better. Afterwards, I went to live at Nelson Square, three quarters of a mile from Union Street. I was very often at my mother's house while I was living in Nelson Square. I remember Mr. Henry Hartley visiting my mother's house as a suitor to my sister (at Portsea it was). No secret was made in the family of Mr. Hartley's intention to marry my sister. The courtship of Mr. Hartley and my sister lasted from September to November, 1798. I never saw my sister and my father together. My sister went to Mrs. Cator's every day. I have seen her there, and went there with her. When my father was away from his ship he slept at Mrs. Cator's, he made it his home. I know he

had liberty from his vessel about twice a week; it is a
 * 140 general thing. * When the marriage of my sister took place his ship was at Spithead; it was the Staunch, it had been there some time. My sister and Mr. Hartley walked out together before their marriage two or three times a week; he was there every day; he always drank tea at my mother's. My father in 1798 did not contribute to my support, or to my mother's support. My sister supported herself at her needle. My mother had 60*l.* a year and the house she lived in. My sister lived with her; my father had ceased to support his family for years; my mother had the care of my sister till her marriage; my father approved of my mother having the care of us. Mrs. Cator was at my mother's every day during the courtship; she lived close by; she was there often when Mr. Hartley was there and saw him; saw him pay Mrs. Cator for washing his clothes. Mrs. Cator made no objection to the courtship; it was no secret in the family. At the time of the marriage, Mr. Hartley's circumstances were superior to my sister's. After the marriage my sister and her husband were at Mr. Hartley's lodgings in Surrey Street, Portsea. I had a child the 25th of March, 1801. His name was James Thomas. I recollect a conversation after his birth with my sister Celia about giving him a hat and frock: she promised to give the frock before she gave it, and she gave them together; the boy was about seven or eight months old when my sister gave the hat and frock; I can't say exactly how long the promise was before when the frock was given. Mr. Hartley was present. Mr. and Mrs. Hartley cohabited together as man and wife up to the time the hat and frock was given and afterwards. I was present when a conver-

sation took place between Mr. and Mrs. Hartley as to dissolving their marriage. It was after James was born, about the time the frock was given. I never saw Hartley after the hat and frock were given. The effect of the conversation was that she was to marry again if she thought fit, and * he too, and he was to allow her * 141 100*l.* a year. Nothing else particular was said. He said he would leave her all that he was worth if he died first. I heard him say that. My sister agreed to take this 100*l.* a year in my presence, and seemed very pleased to do so as she had no home of her own. They agreed that legal proceedings should be taken for that purpose. Mr. Hartley himself proposed that my sister should have the 100*l.* a year. They both proposed that legal proceedings should be taken: they agreed it should be so; after this conversation they went to London for this purpose. They went together to London. They went to London and returned together."

On cross-examination she deposed as follows: "My sister did not live with Mr. Francis at his shop; she was married to him and lived at a house he bought for her in Hampshire Terrace, in Portsmouth. I don't know when Mr. Francis bought the house. My sister did not go to live there till years after Mrs. Roofe was born. I suppose Francis Francis did not live at the house he took for her; he did not like to leave his shop at night to a shopman. After the marriage with Francis Francis she went by the name of Mrs. Francis, and went by that name to her death, and was buried by that name. I was mistaken when I said my sister had only two children; she had a girl named Laura: she went by the name of Laura Francis. I can't say whether my sister was living with Francis Francis when Laura was born. Francis Francis did not live with my sister when Francis Francis was born; my sister passed as Mrs. Francis for years."

A bond was also produced dated November 26th, 1801, in which Mr. Hartley became bound to Mr. Francis in 900*l.* The following were the terms of the condition of this bond:—

* "Whereas the above bounden Henry Hartley and Celia * 142 Ann his wife, by their mutual desire and by their mutual request, have agreed to live separate and apart from each other, and the said Henry Hartley is desirous to make a provision for the maintenance and support of the said Celia Ann by allowing her the sum of 100*l.* per annum in manner hereinafter mentioned.

Now the condition of the above written obligation is such that if the above bounden Henry Hartley, his heirs, executors, and administrators do and shall during the natural life of the said Celia Ann his wife well and truly pay or cause to be paid unto the above Francis Francis, his executors, administrators, and assigns, one annuity or clear yearly sum of 100*l.* by even quarterly payments of 25*l.* each, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first payment thereof to begin and be made on the 25th day of March next ensuing the date of the above written obligation, in trust to be by the said Francis Francis, his executors, administrators, and assigns, forthwith paid to the said Celia Ann Hartley for her sole and separate use, support, and maintenance (whose receipt alone shall be a sufficient discharge for the same), or do and shall pay into the hands of the said Celia Ann Hartley for the purpose aforesaid, the said annuity or clear yearly sum of 100*l.* by even quarterly payments on the days and times hereinabove mentioned for payment thereof (notwithstanding any sentence of nullity of marriage which may be hereafter obtained by either of them the said Henry Hartley and Celia Ann his wife in any Ecclesiastical Court, by reason of minority or upon any other account whatsoever), then the above written obligation is to be void, but if default shall be made in payment of the said annuity or yearly sum of 100*l.* on any of the days and times

* 143 above limited for * payment thereof, then the above written obligation to be and remain in full force, virtue, and effect."

The other facts appear sufficiently from the judgments.

Mr. Daniel and *Mr. Cole* supported the appeal.

Mr. Malins and *Mr. Giffard* were for the plaintiffs, the trustees.

The Solicitor-General, Mr. Russell, and *Mr. Shebbeare,* for the corporation of Southampton.

Mr. Glasse and *Mr. C. T. Simpson,* for the next of kin.

Mr. Freeman, for the heir-at-law.

Mr. Marett, for another defendant.

The following authorities were referred to: *Duchess of Kingston's Case*, (a) *Piers v. Piers*, (b) *Lord Bandon v. Becher*, (c) *Smith v. Huson*, (d) *Jones v. Robinson*, (e) *Johnston v. Parker*, (g) *Hayes v. Watts*, (h) *Doe v. Price*, (i) *Perry v. Meddowcroft*, (k) *Meddowcroft v. Huguenin*. (l) The following statutes were also cited: 4 Geo. 4, c. 17, § 2; 4 Geo. 4, c. 76.

June 13.

THE LORD JUSTICE KNIGHT BRUCE. — In this appeal the question for decision is in effect the *legitimacy or illegitimacy of the exceptant Mrs. Roofe, a lady born in England, of an English mother, who at the time of the birth of Mrs. Roofe was either unmarried, or the wife of Mr. Hartley, the testator in the cause, also an English person; the point to be determined being, whether, at the time of Mrs. Roofe's birth, which happened in the month of May, 1801, her mother, whose maiden surname was Crowcher, and who, when or before that event happened, bore or had borne, correctly or erroneously, the surname of Hartley, and passed or had passed as the wife of the testator, was in truth that person's wife, — a question which, upon this appeal, must certainly without the slightest hesitation be answered in the affirmative if of the materials before the Court a certain portion, consisting of two pieces of documentary evidence, ought to be considered as of no weight against the exceptants, those two pieces of documentary evidence being a sentence of the Consistory Court of the Bishop of Winchester, pronounced in the year 1802, and a certain entry in the parish register of Portsea, in Hampshire, made in the year 1798. For though, if those two things were out of the case, there would not be direct proof of a ceremony of marriage having taken place between Mr. Hartley and Miss Crowcher, the other testimony is sufficient to raise, to justify, to render indeed unavoidable, the inference and presumption that

(a) 20 State Trials, p. 355; 2 Smith's Leading Cases, 424.

(b) 2 H. L. Cas. 331.

(g) 3 *Ib.* 39.

(c) 3 Cl. & F. 479.

(h) *Ib.* 43.

(d) 1 Phillim. 287.

(i) 1 Man. & Ryl. 683.

(e) 2 *Ib.* 285.

(k) 10 Beav. 122.

(l) 3 Curt. 403, & 4 Moore, P. C. C. 386.

they had been lawfully married to each other before the birth of Mrs. Roofe, and were at that time husband and wife.

The sentence, then, and that entry in the parish register of Portsea, are all that the respondents have to rely on.

The consideration of the sentence I will postpone, so as to deal with the case in the first instance, as if the only difficulty in the

expectants' way were created by the entry in the Portsea

* 145 parish register; an entry of a * marriage, contended by the

respondents to show, and (I agree) showing a ceremony of

marriage to have taken place between Mr. Hartley and Miss Crow-

cher in a church (I take it the parish church) at Portsea on the

24th of November, 1798, which circumstance, in this particular case,

excludes any possible presumption of another marriage ceremony

or marriage contract having taken place between them, it not

being alleged or probable that they were at any time out of Eng-

land. Is the Portsea marriage, then, which certainly took place

before Mrs. Roofe's birth, to be considered as having been a valid

marriage?

In the first place I assume this point not to be affected in any

manner by the statutes of George IV., mentioned during the

argument, or by any one or more of them,—an assumption by

which, as I conceive, neither party is damaged. The register of

the marriage states it to have been by license, and I concur with

the respondent's counsel in saying that it must accordingly be

taken not to have been by banns. The lady, however, is said (and

probably with truth) to have been, in and after the year 1798, a

minor, and though certainly she had in and after that year a law-

ful father living, his consent is not, and that of her mother is,

mentioned in the entry. No license nor any bond or affidavit

connected with a license has been found; nor is there any evi-

dence, direct or indirect, primary or secondary, of any license,

except the evidence afforded by the entry. And we are accord-

ingly compelled to suppose one of these things to be true: 1.

That there was no license, real or fictitious, honest or fraudulent;

or 2. That there was a false and fictitious license; or 3. That

there was a license obtained as upon an intended marriage of two

adults, or as upon the consent of Miss Crowcher's mother; or 4.

That there was a license in the form regular and ordinary,

* 146 where the man * is an adult and the woman a minor, hav-

ing a father living, and his consent; and accordingly that

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the consent of the mother was mentioned in the entry by mistake. As to the first, second, and third of these suppositions, any one of the three, I think, renders it necessary to believe in an amount of ignorance or folly or delinquency in Mr. Hartley, Mrs. Crowcher, Miss Crowcher, the officer who issued the license, if there was a license, and the clergyman who performed the marriage ceremony, or some one or more of those five persons, too gross and too improbable to be inferred from the materials before us. There is no pretence for suspecting a conspiracy with Mr. Evan Evans, the curate who officiated, or for imputing forgery, or indeed, as I think, any criminal design or wrong intention to any person in or about the matter, nor can I ascribe to the clergyman such incapacity and unfitness as would be ascribable to him had he solemnized the marriage without either banns or license. The age of Miss Crowcher must be taken to have been known to herself as well as her mother, and not concealed from Mr. Hartley. There appears not the least reason to believe that Mrs. Crowcher in her husband's lifetime passed as his widow, or at any time professed or represented herself to be a widow when she was not so. The great probability is that her husband's existence, and her condition and circumstances, were during the whole period of the courtship and engagement notorious to all her acquaintances and neighbours; and though perhaps there would not be exceedingly violent improbability in the suggestion, that by an honest mistake, if not correctly, the mother's consent was, in the particular state and circumstances of the family, considered by Mr. Hartley and herself and her daughter as including or equivalent to the consent of the father, and that the matter was innocently stated to the surrogate in such a manner as induced him to imagine Mrs.

* Crowcher a widow, and to issue the license accordingly, and * 147 that so the marriage was solemnized without any intentional misconduct on the part of any person under a license, in that sense erroneous, — I consider the materials for such a suggestion too slender to render it admissible.

There remains, then, but the last of the four suppositions which I have stated, and that last I think the correct and true one, the inference that I draw from the known facts being that the license was of the kind usual and regular when the intended husband is an adult, and the intended wife a minor, having a father alive, and having his consent to the marriage, and that the mention of the

mother's name in the entry was by mere error. Let it, however, be supposed that the license was obtained and issued upon a representation, guiltily or innocently made to the surrogate, and believed by him, either that both the intended husband and the intended wife were adult, or that Mrs. Crowcher was at the time a widow. Still if in point of fact the marriage was with the consent of Miss Crowcher's father, that would, I apprehend, support the marriage, as *Smith v. Hewson* (a) and other authorities show.

Ought it then to be taken that he consented in fact? And as to this, whatever may have been the nature of the license, considered as a genuine license, whatever the representation or belief under which the surrogate issued the license, I think it enough that the father is not proved to have dissented; enough, I say, in the actual and known circumstances of the case; for neither the courtship nor the engagement was, in any sense, clandestine or kept secret, or not open or not avowed. He was, during * 148 the whole time of the courtship and * engagement, in the neighbourhood, and, though not living with his wife, yet frequently a visitor at the house of his sister Mrs. Cator, who must from the evidence be taken to have been, during the entire period of the courtship and engagement, well aware of what was going on, inasmuch as that lady during the whole time was in communication, frequently or occasionally at least, with Mr. Hartley, and on terms of continual intercourse and close intimacy with Miss Crowcher and with Mrs. Crowcher, whose residence was very near that of her sister-in-law, and was the home of Miss Crowcher. Under the circumstances it is impossible rationally to believe that the father did not for weeks before the marriage know of the engagement. It seems to have been a good match for the young woman, at least in the ordinary sense of that expression. It was one approved by her mother, upon whom the charge of her children had been wholly cast by their father, and is likely to have been rather approved than disapproved by him. There is not, I repeat, the least reason to believe that he ever expressed or intimated dissent or dissatisfaction, and upon principle and authority I consider the just deduction and reasonable presumption from all the proved facts to be that he consented —

(a) 1 Phillim. 287.

sufficiently consented — to the marriage, and that it was a lawful and valid marriage.

There remains the question that hitherto I have not touched, whether the sentence of 1802, pronounced in the Court of the Bishop of Winchester in a cause of nullity of marriage instituted by the wife (so I call her advisedly) against the husband — a sentence which, according to her prayer, declared their marriage null — was obtained by collusion between them — whether the sentence — whether the suit was *fabula non judicium*; and the evidence convinces me of the affirmative of that proposition, laying

little or no stress on the mere insufficiency * of the evidence * 149 before the Ecclesiastical Court to warrant a sentence of nullity, although that insufficiency seems to me plain and manifest. I need only say that, in my judgment, the bond for Mrs. Hartley's benefit, given but eight days before the commencement of the suit, cannot reasonably be viewed as not intimately and closely connected with it, and that, if the bond is not alone enough to establish the collusion, that instrument in conjunction with the very great improbability that, without some such provision, she would have sued, and in conjunction with the evidence of Mrs. Hartley's sister before the Master, — the grossly defective examination of Mrs. Crowcher as a witness in the Bishop's Court, — and the weak and futile manner in which a suit, so ill founded and so liable to be justly defeated, was, within three or four years after the marriage, defended, appears to me plainly to conclude the point. And this I say without reckoning as a circumstance in the exceptant's favour either the fact that Mrs. Hartley's father was dead when the suit of nullity was commenced or the fact that it was on the day of the date of the sentence of nullity, namely, the 25th of June, 1802, that Mrs. Roofe was baptized as the daughter of "Henry and Ann Celia Hartley," the suit of nullity having been begun by Mrs. Hartley while she was pregnant of her daughter, namely, in December, 1801.

I have not omitted to observe the assertion of an intention to appeal, which is at the end of the sentence. If that is not mere form, it seems to me to be what, in some of the books, is styled a double hatching of a fraud. For, if the Winchester suit was not fraudulently and collusively instituted, no suit in my opinion ever was so. If it was not fraudulently and collusively defended, none, I think, ever was so. The husband and wife played into

* 150 each other's hands with gross candour. * It was a disgraceful and scandalous transaction, and the whole of the indecent farce sanctioned by the bishop's functionaries as a grave solemnity, if of any weight at all, is adverse to the case of the respondents. The truth of the assertion that Mrs. Roofe was the lawful daughter of Mr. Hartley is, on the whole, established to my satisfaction.

The proper order to make must accordingly, I think, be to discharge the order of February last, to allow the fourth exception, and, without allowing or overruling any one of the other exceptions, to declare the just and proper conclusion from the evidence before the Master to be, that the exceptant, Mrs. Roofe, is the lawful daughter of Henry Robinson Hartley, the testator in the cause, and with that declaration, to refer it back to the Master to review his report, the exceptants taking back both deposits.

THE LORD JUSTICE TURNER. — I have little to add to the reasons which my learned brother has assigned for the conclusion at which he has arrived, and in which I fully concur. The question which we are called upon to decide is, whether the marriage of the father and mother of the appellant, Mrs. Roofe, was a valid marriage; for, if the marriage was valid, there is no doubt that Mrs. Roofe was the lawful issue of that marriage. That a marriage was solemnized between the father and mother of the appellant, Mrs. Roofe, in the parish church of Portsea, on the 24th of November, 1798, by a regularly ordained minister of the Church of England, is not disputed; but the validity of that marriage is questioned upon the ground that the mother of Mrs. Roofe was at that time under the age of twenty-one years; that the marriage was by license; that the lady's father was living, and did not
 * 151 * consent to the marriage; and that, upon this ground, the marriage was declared to be null and void by a sentence pronounced by the Judge of the Consistory Court of the Bishop of Winchester, on the 25th of June, 1802, in a suit instituted by the mother against the father for the purpose of obtaining that declaration.

That this sentence, if obtained without fraud or collusion, would bind the question and establish the invalidity of the marriage, was not disputed on the part of the appellants; but it was contended on their part, that the sentence was obtained by fraud and collu-

sion, and that a sentence so obtained could have no valid or binding effect. To this latter position I have no difficulty in assenting. I think that the proceedings of a Court of justice may be vitiated and rendered void by fraud and collusion, in the same manner and to the same extent as the most solemn acts and deeds of the parties may be vitiated and rendered void upon that ground. The first question therefore to be considered in this case is, whether, upon the evidence before us, the suit for annulling the marriage can be affected by fraud and collusion. This is a question depending wholly upon the evidence, and upon the evidence it stands thus:—

[His Lordship read Mrs. Froggatt's evidence and the bond set out above.]

In the face of this examination and of this instrument, it cannot (as it seems to me) be doubted that this suit was instituted by agreement between the husband and the wife, and that it was the object and intention of both of them that it should result in a sentence by which their marriage should be annulled. The parties, though appearing before the Court in hostile characters, were both, in truth, endeavouring to obtain the same result; but this was concealed from the Court. The * Court was kept in * 152 ignorance of the intention of the parties and of the arrangements which had been made for effecting it, and its attention and vigilance was thus put to sleep. This alone might be sufficient to stamp the character of these proceedings; but it was suggested on the part of the respondents, that although these parties may have intended that there should be a sentence annulling their marriage, there may have been no fraud on their part; that they may have known that the marriage was invalid, and may have acted upon that knowledge; or may have intended *bonâ fide* to submit the question of the validity or invalidity of the marriage to the judgment of the Court. I think, however, that neither of these suppositions is consistent with the evidence of Mrs. Froggatt, and, independently of her evidence, the facts of the case do not appear to me to warrant either supposition. The recital of this bond is, that the parties had agreed to live separate, and the bond is conditioned for the payment of the annuity during the life of the wife, notwithstanding any sentence of nullity. The bond therefore (as

it seems to me) contemplated the case that the marriage might not be annulled, and shows that the parties doubted whether it could be annulled or not; and with reference to the parties having intended to submit the question of the marriage *bonâ fide* to the judgment of the Court, we can judge of their intentions only by the course which they adopted; and, when we look to the evidence in the suit, to which I think we are entitled to refer, not for the purpose of judging of its sufficiency or insufficiency to ground the decree, but for the purpose of ascertaining whether it was the intention of the parties to put the case fairly before the Court, I think it clear that this was not their intention. The Admiralty books which are in evidence before us prove that the *Staunch*,

on board which ship the father of the wife was a common
 * 153 * sailor, was stationed at Portsmouth, where the husband and wife were living during the whole period of the courtship; but this fact was not disclosed by the evidence in the suit, and the fact of the father having been alive at the time of the marriage is proved by parties who speak to their having seen him at different intervals after that event, and one of whom states that the father told him that he had been on a cruise on the coast of France, without any mention of the period when he went or when he returned. Under these circumstances I am fully satisfied that this sentence of nullity was not obtained *bonâ fide*, but is affected by fraud and collusion, and cannot be received as conclusive evidence of the invalidity of this marriage.

It then remains only to consider the question upon the whole of the evidence before us, and in this view of the case I think that having regard to the general rule which applies to all cases of presumption, *omnia ritè acta presumuntur*, and to the particular force of that rule as applied to cases of presumptions in favour of marriage and legitimacy, and against the commission of any crime or offence, and having regard also to the cases which were cited in the argument, we are bound in this case to presume that the father was consenting to the marriage, and that it was therefore valid. The circumstance of the marriage being expressed upon the face of the register to be with the consent of the mother, was relied upon against this presumption; but I think it more than probable that the mother's consent was entered upon the register in consequence of her having been present at the marriage, and,

at all events, the fact of her consent having been given would not, I think, be sufficient to countervail the presumption that the father was consenting also.

I concur, therefore, in the order which my learned brother has proposed.

* SIMPSON v. CHAPMAN.

* 154

1853. June 22, 23. Before the LORDS JUSTICES.

A testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the good-will of the concern. The credit, in which the bank was, rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account, as a customer. After his death the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration of the testator's estate: *Held*, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank.¹

THESE were two appeals from a portion of a decree of Vice-Chancellor STUART in a suit for administering the assets of a testator named Thomas Simpson, who for some years previously to, and at the time of his death, carried on the business of a banker at Whitby, in copartnership with John Chapman, one of the defendants, and Abel Chapman, under the firm of Simpson, Chapman, & Co. The partnership was one at will, and had subsisted for several years, but without any articles, the profits being equally divided between the partners, and there being no stipulation as to the share of a deceased partner in the good-will of the concern.

By his will dated the 20th of April, 1843, the testator gave all his residuary personal estate (which included whatever interest he had in the bank) to the defendants John Chapman, Henry Simpson, and Thomas Brodrick Simpson, in trust for his sons the defendants Henry Simpson, Thomas Brodrick Simpson, and the

¹ See 2 Lindley Partn. (Eng. ed. 1860) 831 *et seq.*, 894; *Macdonald v. Richardson*, 1 Giff. 81.

plaintiff George Simpson, in equal shares absolutely, and the testator appointed John Chapman, Henry Simpson, and Thomas Brodrick Simpson executors in trust of his will. The testator died on the 26th of May, 1843.

Thomas Brodrick Simpson did not take an active part
* 155 * in the executorship, but left the administration of the testator's estate to the defendants, John Chapman and Henry Simpson.

The bill contained the following charges : —

That each of the partners in the bank, viz., the testator and Abel Chapman and John Chapman, had private current accounts with the firm, in respect of which various sums were from time to time standing to their credit or debit as the case might be, and in respect of which they were treated and considered as ordinary customers of the bank.

That each of the partners was entitled to one-third of the assets of the partnership, and liable to the payment of one-third of the liabilities thereof, and that, except such interest in the assets of the bank, neither of the partners had any capital therein.

That the value of the assets of the partnership at the testator's death and for some time previously thereto exceeded the amount of all its liabilities by a comparatively small amount, and that, in fact, as the bank was, from the well-known wealth of its partners, in good credit, it was unnecessary that the partners should retain therein any considerable surplus of assets above its liabilities.

That the bank was a bank of issue as well as of deposit, and that the profits of the partnership arose from the employment at interest by way of loans to customers on overdrawn accounts and otherwise, and investment, in other modes, of moneys placed in their hands by way of deposit, and of the amount of their notes in circulation.

That since the death of the testator the defendant
* 156 * Henry Simpson had assumed to be and had acted as if he had been a partner in the banking business with John Chapman and Abel Chapman in the place of the testator.

That there was at the time of the testator's death a considerable sum of money in the banking-house in cash and Bank of England notes, and that since the testator's death various moneys had been received and paid in cash and Bank of England notes in respect

of bills of exchange and notes of other bankers, which were the property of the partnership at the time of the testator's death, and in respect of the principal and interest of debts due to the partnership at the time of the testator's death and otherwise.

That there had also since the testator's death been received at the banking-house of the said copartnership various sums of money in cash and Bank of England notes from creditors of the bank at the time of such payments, and by persons who had become customers thereof since his decease.

That the cash and Bank of England notes which were in the banking-house at the time of the testator's decease were not in any way set apart or appropriated for the payment of the debts and liabilities of the partnership at the time of his death, but remained in the till or depositories of the said banking-house, and that there were added thereto and mixed therewith the cash and Bank of England notes which were in the course of business received at the banking-house after the testator's death; and that, in fact, all the cash and Bank of England notes received at the banking-house since the testator's decease had been mixed together in the till or other depositories of the banking-house without any distinction.

* That the several checks which had been drawn on the * 157 said bank since the testator's death had been paid out of such mixed fund, except so far as they had been paid by notes of the partnership.

That such checks had been paid indiscriminately out of the above-mentioned mixed fund, whether they were checks on accounts or for sums in respect of which the said copartnership was indebted in the lifetime of the testator, or were drawn by persons whose accounts with the said copartnership were overdrawn at the time of drawing such checks, or by new customers of the bank, or otherwise by way of advance, and not in payment of any liability of the said partnership in the testator's lifetime.

That in fact the moneys which had been repaid, and which were still due in respect of principal and interest of overdrawn accounts and advances, were to some extent the fruits of the cash and Bank of England notes, the property of the partnership at the time of the testator's death, and received in respect of the debts owing to and other assets of the said copartnership in the testator's lifetime.

That the various checks drawn upon the partnership since the

testator's death had been, so far as the persons presenting the same were willing to accept payment in that manner, paid partly by notes of the partnership which were in the banking-house at the time of the testator's death, and partly by the reissue of notes of the partnership issued in his lifetime, which had been paid into the banking-house since his decease.

That such checks had been so paid indiscriminately, whether they were drawn on accounts or in respect of sums for * 158 which the partnership was liable at the time of * the testator's death, or on accounts which were at the time of payment of such checks overdrawn, or for new customers, or otherwise by way of advance.

That the moneys which had been repaid and were now due to the existing partnership in respect of accounts overdrawn since the testator's death, and in respect of advances made since his death, were to some extent the fruits of the balance of the partnership in the hands of their London agents or bankers at the time of his death.

That money which was received in respect of certain Whitby and Pickering Railway shares and bonds, which were part of the property of the copartnership at the testator's death, was paid into the banking-house of the copartnership, and mixed with the other moneys, and applied to the general purposes of the bank.

That several of the debts due to the said copartnership at the time of the testator's decease remained unsatisfied, and part of the property of the partnership at the time of his decease remained unrealized, and that several of the debts due from the said copartnership at the time of the testator's death were unpaid, and that a large quantity of the notes issued by the said copartnership in the testator's lifetime still remained outstanding.

That such of the debts due and owing to the said partnership at the testator's death, as had been paid, had been paid from time to time, and many of them at an interval of some years from the testator's death, and that such of the debts due from the partnership at the time of the testator's death as had been paid and discharged, had been so paid and discharged at considerable intervals of time after the testator's death.

* 159 * That the several debts due to the partnership at the testator's death, and the several advances which had been made since his death on current accounts and otherwise, had car-

ried interest at the rate of 5l. per cent per annum, or some other high rate of interest, whilst the debts due and owing from the partnership either carried no interest or only a small rate of interest.

That by such difference in the rate of interest, considerable profits had arisen since the death of the testator, and that the defendant Henry Simpson had received and claimed to be entitled to receive and retain for his own use one-third of such profits from the testator's death, in the same manner in all respects as the testator would have been entitled to have done if he had been alive.

That, with the exception of the said Henry Simpson assuming to be substituted for the testator as the person entitled to receive the one-third of the profits, the business has been carried on since the testator's death, in the same manner in every respect as if he were living.

That Abel Chapman was from a period antecedent to the testator's death, and had since continued, and still was imbecile by reason of age, and incapable of entering into any contract or transacting any matter of business; and that the alleged admission of the said Henry Simpson as a partner, and all the acts which had been done with reference to the banking business since the death of the testator, had been the acts of Henry Simpson and John Chapman only.

That the plaintiff sought no relief against Abel Chapman and John Chapman in respect of the one-third of the profits which they had respectively received on their * own account, * 160 and which in any event they were so entitled to receive, but the plaintiff charged that Henry Simpson and John Chapman as executors of the testator were liable to account for the one-third which had been received by or credited to Henry Simpson of the profits which have arisen from the carrying on the business since the testator's death, so far at all events as such profits had arisen from the testator's credit on the notes and liabilities of the partnership, from the interest of debts due to the said copartnership in the testator's lifetime, from the interest on advances made on overdrawn accounts or otherwise, with moneys which had arisen and been produced from the assets of the partnership in the testator's lifetime, or with the notes of the partnership signed in the testator's name thereon, and from the outstanding liabilities of the partnership in the testator's lifetime.

That in fact no profit had arisen to the said business from any other source than as aforesaid.

That if any part of the profits of the said banking business had arisen from any other source, and the amount thereof could not be distinguished and separated, the testator's estate ought to be credited with the whole amount which had been paid or credited to Henry Simpson in respect of the one-third of the profits of the business; and that the plaintiff was entitled to have the partnership wound up on the principle that one-third of the assets thereof belonged to the testator's estate.

The prayer was for an account of the residuary real and personal estate of the testator, and the proceeds thereof possessed or received by or come to the hands of the defendants, and that the share therein of the plaintiff might be ascertained and paid

* 161 to him; * and that in taking such accounts the defendants

Henry Simpson and John Chapman might be charged in respect of the share of the profits of the said banking business, carried on since the testator's death, paid or credited to Henry Simpson and otherwise in respect of the said banking business.

It was agreed at the bar that, at the testator's death, the bank property was worth 177,000*l.*, and that the firm owed debts to the amount of 165,000*l.*, leaving a balance in their favour of 12,000*l.*, and that the testator at his death owed the concern 14,000*l.*; so that if it had been wound up he would have paid 10,000*l.* and received nothing.

By the decree appealed from, the Vice-Chancellor directed an inquiry whether the defendant Henry Simpson ever brought any capital into the banking-business in the pleadings mentioned, except the assets of the testator, and it was declared that in taking the accounts, the defendants John Chapman and Henry Simpson were to be charged in respect of the profits of the bank from the death of the testator, paid or carried to the credit of the defendant Henry Simpson, so far as such profits had accrued from the assets of the testator employed in the partnership.

From this portion of the decree, both the plaintiffs and defendants appealed, the plaintiffs on the ground that it should be extended and made more adverse to the other appellants, who, on their part, insisted that it should be wholly omitted, and that nothing should be substituted for it.

Mr. Bacon and *Mr. Faber*, for the defendants. — In point of fact there was nothing that could be called * capital in * 162 the business. The business was carried on by means of the deposits of customers, by continuing transactions previously entered upon, and at the testator's death there were no assets whatever of his in the firm.

The plaintiff's case was before the Vice-Chancellor attempted to be supported by the authority of *Crawshay v. Collins*; (a) but in that case there was capital of the bankrupt employed, whereas it is stated on this bill, and admitted, that there was no capital of the testator in the concern, and the good-will is the only property which is contended to have remained of the testator in the concern after his death. The argument is that this good-will continued, although there was no stipulation to that effect, because the doors of the banking-house were not closed, and the business entirely put an end to. On this ground it is argued that the testator's estate ought to have one-third of the profits exactly as he would have had if he had been alive. In 1843, 177,286*l.* 6*s.* was the amount of the assets (sundries debtor to stock). On the other side the debts and liabilities (that is to say, stock debtor to sundries) are 174,000*l.* The partnership at the testator's death (with the full assent of the residuary legatee, the plaintiff and Thomas B. Simpson, the other executor) carried to the credit of an account opened by the executors with them the sum which stood to the testator's credit in the books. That sum and every other sum received on account of his estate has been carried to the credit of the testator's account, and the pass-book has gone from hand to hand from time to time, and every shilling available for the testator's estate has been accounted for. That course of dealing lasted from 1843 to 1849, a period of six or seven years.

* In these circumstances it was wholly premature and * 163 wrong to declare that in taking their accounts the executors were to be charged with the profits so far as the profits have accrued from the assets of the testator employed in the business. If it could be right at all (which we submit it is not), it was wrong, at all events, to make any declaration till previous inquiries were made.

Mr. Malins and *Mr. J. V. Prior*, for the plaintiffs. — The par-

(a) 15 Ves. 218; 1 Jac. & W. 267.

ticular grounds on which we claim a share of the profits are these. First with reference to the difference of interest. Suppose there was no balance in favour of the bank, but that there was 160,000*l.* owing to the concern, and 160,000*l.* owing from it, still the moneys due to the partnership bore five per cent interest, whereas the moneys owing from the partnership bore a much smaller rate. The consequence is, as appears by the answer, that the interest received has been 9600*l.*, the interest paid has been little more than 7000*l.*, leaving a balance of 2300*l.*, which has been the profit arising from the non-liquidation of these debts nearly balancing each other at the time of the testator's death. The delay of the customers in forbearing to call in their money has been a saving of interest, while those who owed money have paid interest. The right to participate in that amount seems given by the answer. The next thing is a balance of 4000*l.* which was in actual cash in the banking-house at the time of the testator's death. As to that, and as to all the other items, the defendants say that they paid the debts and liabilities with the assets in the ordinary course, and that they did not use the assets except during the intervals that the debts and liabilities were not called for, and that as there was a certain sum of money in which the testator's estate was interested to the extent of one-third, there was an equivalent

* 164 * sum to pay. We say, however, that the testator's estate was entitled to one-third of this benefit, and to the use of these moneys during that interval of time. The circumstance of there having been a debt that was to be paid at some future time, did not make this property less assets in which the testator's estate was interested, nor did it make the profits less part of his estate. Mr. Abel Chapman and Mr. John Chapman have only claimed two-thirds of these profits. Each has taken one-third, and they have allowed Henry Simpson to take one-third for his use. But what Henry Simpson received with the permission of his partners, he received as profits derived from the employment of the testator's assets. He could not take it for his own benefit, he could only take it as part of the testator's estate. If there had been a settlement upon the testator's death, Henry Simpson must have brought in fresh money, and the testator's estate would have been relieved from the liability of that five per cent interest with which his account was chargeable. The five per cent interest on the debt due from the testator to the bank was part of the profits

of the bank, which Henry Simpson actually took as part of those profits. With regard to the balance lying with the London bankers, nothing could have been more easy than to have written to the London bankers and said that 1800*l.* must be carried to a separate account, and that checks should be drawn against that amount separately, and that 1000*l.* should be sent to go on with for the new partnership, so that the checks and bills and orders in respect of the liabilities of the old partnership would be drawn on one account, and the bills and orders for the purposes of the new firm on the other account. But then Henry Simpson must have found his one-third of that sum which would have been thus remitted to the London correspondents to keep the concern going, and to enable them to provide the *money which *165 was wanted for the new partnership.. Therefore it comes to this, that Henry Simpson has avoided the necessity of contributing to the current capital, which, according to the new establishment of the bank, must have been found to start with. He has avoided the necessity of bringing in that capital, and has taken the benefit of the testator's money, and, by the employment of it, made a profit. So with the notes of the old firm which were reissued. We admit that the testator's estate might not have been bound by them, and that, ordinarily speaking, they ought to have been destroyed; but if the executors have managed so as to give those pieces of paper a value, by lending them as money, and received five per cent interest upon them, one-third of this has been obtained by the use of the testator's name. The executor could not retain that one-third which he had made by the use of documents which ought not to have been used at all, and which really were of no value. These are the grounds on which we say that as between the testator's estate and the executor, the plaintiff is entitled to have accounted for as part of the estate at least such profits as have arisen from the testator's credit on notes and liabilities of the partnership and from the interest of the debts due to the partnership in the testator's lifetime. But if it is impossible to ascertain how much profit has been introduced from these sources, then the executor is not entitled to the benefit of his own default, and of the inaccurate mode of keeping his accounts, but the testator's estate must be entitled to the whole benefit. The defendants by their answer say it is utterly impossible to make the distinction. They say, "How much of the cash of the banking-

house at the time of the testator's death was employed in paying the partnership debts, how much was employed in making advances and interest to other persons, we know not; we * 166 have no document to show how many notes were * issued after his death. We have no means of telling." In fact, the allegation is generally that the accounts have been kept in such a way that it is impossible to make any distinction of that sort whatever.

[THE LORD JUSTICE TURNER. — Has the rule ever been adopted of charging partners on the same principle on which an executor is charged? His Lordship referred to *Wedderburn v. Wedderburn*. (a)]

In that case, there were other partners, all of whom received the profits jointly, whether executors or not; but there the share of the profits, which we say belonged to the testator's estate, was received by an executor alone, and by an executor who was not a partner of the testator in his lifetime, but who came in after the testator's death, and took not merely the good-will of the business, which possibly the surviving partners might have given him, but also that which they have not the power to give him, namely, a portion of the testator's property in the concern.

THE LORD JUSTICE KNIGHT BRUCE. — The appeals in this case relate only to a small portion of the decree: to these words, namely, "an inquiry whether the defendant Henry Simpson ever brought any capital into the banking business in the pleadings mentioned, except the assets of the said testator; and the Court declares that, in taking the accounts hereinbefore directed, the defendants John Chapman and Henry Simpson are to be charged in respect of the profits of the said bank from the death of the testator, paid or carried to the credit of the defendant Henry Simpson, so far as such profits have accrued from the assets of the said testator employed in the banking partnership."

* 167 * This passage, it is contended by the plaintiff, should be extended and made more adverse to the other appellants, who, on their part, insist that it should be wholly omitted, and that nothing should be substituted for it.

(a) 4 M. & Cr. 41.

It is in the first place to be borne in mind that the plaintiff has so constructed his suit as to preclude him from obtaining a partnership account in the cause, for which the absence from the record of Mr. Abel Chapman (who never was a party), and the circumstance that his estate is not represented before us, are alone a sufficient reason, if there were no other ground. That omission is not through any wish or neglect on the part of any of the defendants.

The question whether the case is brought within the principles on which *Crawshay v. Collins*, (a) and other authorities of that class, proceeded may be a very different question.

To the proper consideration, however, of this latter point, it is essential that we should determine whether the partnership formed between Mr. Abel Chapman, the defendant Mr. John Chapman, and the defendant Mr. Henry Simpson owed its origin or had reference to Mr. Henry Simpson's character of one of the testator's executors. And the evidence, I think, renders it necessary to decide this particular question against the plaintiff; nor was it, I conceive, as one of the residuary legatees that Mr. Henry Simpson became a partner.

I collect that he became a partner as he did, merely and simply on his own account. Still he may have employed or concurred in employing assets of his father * in the business in * 168 such a manner as to constitute or amount to a breach of trust. Is it established that he did? In my opinion not. The partnership of which the testator was a member ended at his death. His partners were entitled not to close the business upon the happening of that event, — were entitled to act thenceforth as bankers in partnership together on their own account, without or with any fresh partner.

The bulk, the chief part of the capital belonging, at the testator's death, to the partnership of which he was a member, consisted of debts due to it from various customers, and from its London agents, and the cash in the banking-house at Whitby, for the supply of its daily purposes in the ordinary way, including notes of the partnership, payable to bearer on demand, intended for circulation and used as cash; while, on the other hand, it owed at that time, in the way of business, debts, to such an amount as that, in truth,

(a) 15 Ves. 218; 1 Jac. & W. 267.

though each of the partners was probably then a wealthy man and very deservedly in good credit, the partnership itself was insolvent, that is to say, the debts due from it exceeded its assets at that time. This, however, is on the footing of treating as not existing, or as a bad debt, a sum of 14,000*l.* or 15,000*l.* due at the testator's death from him on his private account to the partnership. Treating that as paid after his death, by his private estate, his executors would in that character have to receive back part, but not the greater part of it. The greater part would belong to his two partners, who (as the surviving partners), being liable personally for the debts due from the dissolved partnership, were entitled to apply its assets towards the discharge of those debts. Doubtless the debts on each side, or many of them, were, after as well as

before the testator's death, in a state of continual or frequent fluctuation; customers paying in money * and drawing out money, borrowing at interest and depositing at interest, diminishing or paying off loans, withdrawing or diminishing deposits. The building and offices where the business was carried on formed part of the testator's real estate, and was devised by him to the defendant Henry Simpson.

Such a state of things, without more special circumstances than I see here, seems to me an insufficient ground for the direction and declaration that these appeals relate to; particularly where, as in the present instance, there has been considerable delay in bringing forward the claim. With the knowledge that the plaintiff must have had, it was incumbent on him to make the demand earlier, even had his case not been so slender and shadowy as it is. Something was said of the common bank-notes of the dissolved firm having been reissued by the new firm after the testator's death. This, however, I cannot hold to be material for any present purpose. The ordinary accounts of the testator's personal estate the plaintiff is entitled to and has obtained. He will have (if he has not had) his due share of its clear residue, not subjected to any amount or proportion of debt which it ought not to bear. No part of the bill has been or now is dismissed. But I am (I repeat) for omitting the disputed words, and substituting nothing for them.

It appears to me, that our order should be made on both petitions of appeal, that the plaintiff should pay the costs of his, and that the other appellants should take back their deposit.

THE LORD JUSTICE TURNER. — This case involves, or may involve, questions of very great importance: questions as to what is to be considered * as capital of an outgoing partner with * 170 reference to a banking concern, in a case in which, in the ordinary sense of the word “capital,” there was in truth no capital at all. It is not necessary, as it appears to me, to give a decision on any of these questions, and certainly they are not questions into which the Court would be inclined unnecessarily to enter.

There are two appeals in the present case; one presented by the plaintiff, complaining in substance of that part of the decree which gives him only the profits of the bank, from the death of the testator, so far as such profits have accrued from the assets of the testator employed in the banking partnership, the plaintiff insisting that he is entitled to an unqualified account of the profits derived from the bank, so far as they have been received by the testator's executors. The other appeal is by the defendants, the executors insisting that all the inquiries relating to the profits of the bank ought to be struck out of the decree.

The first question which it appears to me to be material to consider, is whether the plaintiff can succeed in his appeal, claiming the right to all the profits of the bank, without reference to the qualification which is introduced into this decree, “so far as such profits have accrued from the assets of the testator employed in the banking partnership.” The object of the plaintiff of course is to charge Henry Simpson, the executor of the testator, with the whole amount of the one-third of the profits of this banking business received by him from the year 1843, when the testator died, down to the present time. To give the plaintiff that relief, would be to assume that all the profits which have been received by Henry Simpson are profits derived from the testator's capital, and, in my * opinion, it is impossible, under the * 171 circumstances of this case, for the Court to make any such assumption. The business here carried on is the business of the bank. The capital with which the plaintiff contends that business to have been carried on consists of money deposited with the firm in which the testator was a partner. But from the nature of the banking business, these moneys must, in the period from the death of the testator to the present time, have been from time to time turned over. The old loans which have been made by old custom-

ers with the old firm, must, from the nature of the banking business, have been paid off, and new deposits and new loans made by the customers to the new firm in which Henry Simpson was a partner. From the nature of the business, therefore, it is impossible, I think, to arrive at the assumption that all the profits which have been derived by this bank from the death of the testator down to the present time, were derived from the capital of the testator. Consequently, I think that the plaintiff cannot succeed in his appeal, which claims the whole of these profits.

I desire on the present occasion to express very distinctly my entire concurrence in the opinion expressed by Vice-Chancellor WIGRAM in the case of *Willett v. Blandford*, (a) in which he has made, I think, a most correct and masterly summary of the principles by which the Court is to be guided in cases of this description. He says (b) that the profits derived from the trade carried on after the death of the testator must depend upon the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased

partner at the time of his death, and the conduct of the
 * 172 parties after his death; that all these * may materially affect the rights of the parties. I fully adopt this view, and, applying it to the present case, I venture to say that it depends on the nature of this trade, on the capital employed from time to time in it, on the conduct of the parties, on the extent of the skill and industry of each partner employed in the concern, to what extent the profits derived from the trade ought to be attributed to the capital, and to what extent they ought to be attributed to other sources;¹ and that, under the circumstances of this case, it would be going much too far to hold that the plaintiff ought to succeed in the claim which he makes for the whole of the profits derived from the testator's third of this concern. My opinion therefore is, that the plaintiff's appeal must be dismissed with costs.

We come then to the question, How, if the plaintiff cannot succeed in his appeal, is this decree to be worked? The Court declares "that in taking the accounts hereinbefore directed, the defendants John Chapman and Henry Simpson are to be charged in respect of the profits of the bank from the death of the testator,

(a) 1 Hare, 253.

(b) *Ibid.* 272.

¹ See Collyer Partn. (5th Am. ed.) §§ 327, 328.

paid or carried to the credit of the defendant Henry Simpson, so far as such profits have accrued from the assets of the said testator ;” but the decree contains no direction and no declaration by which it can be ascertained how far the profits are to be considered as having accrued from the assets of the testator. That is a question left wholly at large. The decree, therefore, in its present state, could not be worked. We must consider, however, whether the declaration complained of on both sides is a proper one to be contained in this decree. The first observation which has occurred to me upon that subject is this : The partnership of which the testator was a member determined upon his death on the 26th of May, 1843. The business was carried on from that time, not as a continuance * of the old partnership, *173 but on a new agreement entered into between the surviving partners and Henry Simpson, the new partner ; Henry Simpson standing in the character of executor, but entering into the partnership not in that character, but on his own separate and individual account. There is here a complete agreement on which, from the year 1843 down to the present time, these parties (including Abel Chapman, who is not represented on this record) have been carrying on their banking business ; and this bill contains no materials for setting aside the agreement which has been entered into between these parties as entered into by them in fraud of the testator’s estate. I mean “in fraud,” of course not in the moral sense, but in the sense of “contrary to the rights of the testator’s estate.” Whether the agreement was contrary to those rights so as to affect Abel Chapman, I do not say ; but at all events it appears that the existing partnership has been carried on upon a new agreement, which this bill does not seek to disturb ; and I do not well see how the declaration can stand, when the bill does not seek to impeach or disturb the agreement on which the partnership has in fact been carried on.

If, however, the bill had sought to disturb that agreement, what is the ground on which a residuary legatee of a deceased partner is entitled to claim profits derived from his share ? That right is founded on a breach of trust in the executor and in the partners, in continuing the trade with the capital which the testator had in the concern at the time of his death. But how is this Court, in the absence of Abel Chapman, to declare that there has been a breach

of trust on the part of the executors and on the part of Abel Chapman in entering into this new agreement, and carrying on this business? If there was a breach of trust on the part * 174 of the executors, there was equally a * breach of trust on the part of Abel Chapman, for which all must be responsible. He may say, "I never was a partner with the executors of this testator; I became a partner with Henry Simpson in his separate and individual character." And is this Court to determine that, as between the executors of the testator and the legatees of the testator, the partnership was carried on with the testator's assets, when, if the question comes to be tried between Abel Chapman and the executors of the testator in a suit for the purpose of winding up the partnership, Abel Chapman may be able to show that he in truth never did become a partner with the testator's executors, and never did in fact employ any part of the capital of the testator in carrying on the business?

There is another, and, as it appears to me, by no means an unimportant question to be considered before a decree can be made on this part of the case. The plaintiff's claim is founded (as I have already observed) on a breach of trust. If the legatees have a right to complain of that breach of trust, is not that a right which must be enforced by winding up the concern and putting an end to the breach of trust? Is a breach of trust to be continued under the sanction of this Court by a continuing account? All the cases which I remember upon that subject have been cases where the legatees have come against the executors and against the surviving partners, complaining that the two parties have employed the assets of the testator in carrying on the concern, and praying that those assets may be taken out of the concern. This bill seeks no such relief.

I am quite satisfied on all these grounds that the inquiry directed by this decree in reference to these points ought not to have been contained in it. It was urged by *Mr. Prior*, that Henry * 175 Simpson, having received * profits of the business, and being unable to distinguish how much of them was attributable to the character of executor and how much belonged to him in his individual character, must be charged with the whole. I believe, however, that that principle has never yet been applied to a case of this description where the executor has not been carry-

ing on the trade as executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

On these grounds my opinion concurs with that of my learned brother, that the reference with regard to the ninth inquiry, and the declaration consequent upon it, must be omitted.

1853. July 11. Before the LORDS JUSTICES.

A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor, *held*, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors.

THIS was an appeal from the decision of Vice-Chancellor STUART, who, on exceptions to the report of the Master, held the respondent entitled to credit as executor of the testator in the cause for a sum of 1196*l.* 16*s.* 7*d.*, claimed by the respondent in his discharge.

In September, 1833, John Close the younger, and James Close the defendant (who were sons of the testator, and carried on business in partnership as merchants at Manchester and Naples), borrowed 5000*l.* of Mr. Henry Gaskell; and in order to secure the repayment thereof, they, on the 30th of September, 1833, by arrangement with the testator, drew and delivered to the testator their three several promissory notes for 1000*l.* each, payable to the testator at the respective dates of one, two, and three years. The testator in pursuance of the arrangement, and at the request of John Close the younger and the defendant, and as their surety, indorsed the three promissory notes to Mr. Gaskell, and joined John Close the younger and the defendant, as their surety, in a bond to Mr. Gaskell for securing payment to him of the balance of the loan of 5000*l.* The testator died in December, 1833, having by his will, dated the 4th of July, 1833, bequeathed his residuary

personal estate to the defendant and another trustee and
* 177 executor (who did not accept the trusts), * upon trusts for realization and investment, and payment of an annuity to the testator's sister, for her life, and subject thereto, upon trust to pay the income to the testator's wife for her life, and from and after her decease to stand possessed of the capital in trust for such of the testator's three sons, Thomas (the plaintiff), John (since deceased), and James (the defendant), as should be then living, and the lawful issue of such of them as should be dead, leaving lawful issue. John Close the younger and the defendant were, independently of the above transaction, considerably indebted to the testator's estate, and were also indebted to the plaintiff. In February, 1836, they fell into difficulties. James (the defendant) was then at Naples in a bad state of health. John and the plaintiff entered into negotiations with the creditors, and a correspondence took place between John and the plaintiff, in the course of which the plaintiff wrote letters to John containing the following passages : —

“ 18th of February, 1836.

“ The mischief is now done ; you have stopped ; your credit is ruined ; the creditors are certainly entitled to the full payment of their claims if your assets be sufficient, but if they be not, when you have given up all, you are entitled to your release. Suppose you pay 18s. in the pound (and your dividing half that sum depends upon the strenuous and devoted exertions of yourself and James), in equity and justice you will be entitled to your full discharge.”

“ February 22, 1836.

“ To bring the matter to a point, do you think the creditors would agree to 15s. in the pound, payment in six months, and guaranteed by Gaskell and myself ? Of course I shall
* 178 come in with the other creditors, and * Gaskell the same ; if Mr. Jackson and Mr. Birley concur with me, you had better have an agreement on paper, embodying the terms, immediately drawn up.”

“ February 22, 1836.

“ These are my opinions. I think a composition of 15s. in the
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pound in full of all claims (every creditor giving up any contingent security he may possess to the advantage of the estate), an equitable arrangement as regards both creditors and debtors. I believe that there will remain some surplus to you and James after this composition is completed, otherwise I would neither give security or sacrifice 500*l.* to 600*l.* for the advantage of the creditors. I am sure that 15*s.* is the highest composition that you can afford to pay under the most favourable circumstances. Mr. Cursham tells me it is too much."

"February 28, 1836.

"The point at issue between me and Gaskell, divested of all surplusage, is, that he wishes to secure more than 15*s.* in the pound, and to effect this by means most repugnant to my feelings; viz., by coming upon my poor mother's property. You may be sure that I shall never consent to this preference over me. However, I think I may now safely inform Mr. Gaskell that the principle of 15*s.* in the pound will not be objected to; and the only question that remains is to ask to what extent he will be a party to the guarantee. I should not be justified in asking more than 3000*l.* after I have voluntarily given up 500*l.* to 600*l.* for the benefit of the estate."

March 10, 1836, John thus wrote to Mr. Gaskell, and (as the defendant alleged) by the plaintiff's desire: "One circumstance has struck my brother Tom and myself as difficult to arrange, which is the obtaining the * consent of the executor of my * 179 late father. You will remember my brother James is the only acting executor. Your experience may suggest some means of obviating this difficulty."

On the 10th of March, 1836, Mr. Gaskell replied as follows: "I should think you may safely undertake for your brother's assent as executor of your father. Your mother, brothers, and yourself are the only parties interested in any surplus there may be after payment of debts, and you and they may now assent; and I should think an undertaking from you and your brother Thomas, that James will execute the composition deed when sent out, will be satisfactory. I, as creditor to the estate, shall consent to the executor acceding to the composition."

A composition was thereupon prepared and executed by several of the creditors, but not by the plaintiff or defendant, or John

Close the younger. It was, however, the common case of both sides that all parties had acceded to the terms of this deed. It was dated the 21st of March, 1836, and purported to be made between John Close the younger and the defendant as copartners of the first part, the defendant as the sole executor of the testator of the second part, the plaintiff of the third part, Henry Gaskell of the fourth part, and the creditors of John Close the younger and the defendant of the fifth part. It recited, amongst other things, that John Close the younger and the defendant were indebted to the several creditors in the several amounts thereunder written and scheduled (which John Close the younger and the defendant were unable to pay); and were also indebted to the plaintiff in the sum of 2125*l.*, and were also indebted to the defendant James

Close himself as the executor of the testator in the sum of *180 2167*l.* 16*s.*, *and were also indebted to Henry Gaskell in

the sum of 5039*l.* 3*s.* 6½*d.* (which debts John Close the younger and the defendant were unable to pay); and it was expressed to be thereby agreed that a composition of 15*s.* in the pound upon the scheduled debts and upon the debts so due to the plaintiff and Henry Gaskell as aforesaid should be paid by John Close the younger and the defendant, and should be (with one immaterial exception) guaranteed as to the last instalment thereof by the plaintiff as therein mentioned; but reserving to Henry Gaskell all liens and other collateral securities for his aforesaid debt.

The instalments payable under the deed were paid by John Close the younger and the defendant, and accepted by the creditors, including Mr. Gaskell, who, after receiving the composition of 15*s.* in the pound, claimed and received from the defendant as executor of the testator the other 5*s.* in the pound upon his debt.

John Close the younger died a bachelor in May, 1842, from which time the defendant had carried on the business of the late firm of "John & James Close," upon his own sole account.

On the 31st of March, 1849, Mary Close, the widow of the testator, died intestate, whereupon the plaintiff claimed to be entitled to one moiety of the testator's residuary estate, and applied to the defendant for an account. The defendant accordingly rendered an account, in which he claimed credit for the amount paid to Mr. Gaskell over and above the composition dividend. The plaintiff objected to allow this, on the ground that the defendant was bound to indemnify the father's estate from it.

* *Mr. Bacon* and *Mr. H. Prendergast*, in support of the * 181 appeal, cited *Payler v. Homersham*. (a)

Mr. Rolt, *Mr. Follet*, and *Mr. Kinglake*, for the defendant. — The surety's estate was a party to this composition, through the concurrence of the defendant as executor of the testator, and the plaintiff as residuary legatee. By their concurrence in the composition the debt was extinguished to all intents and purposes. The provisions of the deed, therefore, are sufficient to support the decisions of the Master and Vice-Chancellor, and it would have been a fraud on the creditors for the plaintiff to have reserved a right to a further payment from either of the debtors. But if there was any doubt as to the intention of the parties, the correspondence clearly shows that the plaintiff abandoned all claim against the defendant and his partner, except under the deed.

They referred to *Owen v. Homan*. (b)

THE LORD JUSTICE KNIGHT BRUCE. — The question here, between the plaintiff, a residuary legatee, and the defendant, the executor of the late Mr. John Close, is whether the plaintiff contracted with the defendant that the personal estate of the deceased should, as between the plaintiff and the defendant, be either the sole or the first fund for discharging a certain portion of a debt which was due to Mr. Henry Gaskell from the deceased as a surety for the defendant, and * against which, therefore, independently of * 182 any such contract, he was bound to indemnify the deceased and his estate. The defendant, holding the affirmative, puts his case on a deed, which is in evidence, and on some letters, also in evidence.

I will first, independently of the letters, consider the deed alone, which was one of composition between the defendant and all or a considerable number of his creditors (a large body in the whole); one of these was the deceased, in respect of a demand altogether different and distinct from Mr. Gaskell's debt, — the estate of the deceased having been (I repeat) then represented by the defendant himself as executor. Another creditor was the plaintiff in his own right, independently of the will; another was Mr. Gaskell.

(a) 4 Mau. & Sel. 423.

(b) 8 M. & G. 878.

Upon these debts, the arrangement, in which they all concurred, was, that the defendant should pay 15s. in the pound in full discharge of them, except that Mr. Gaskell, as to the remaining 5s. in the pound of his debt, expressly reserved his rights against the estate of the deceased. Those rights he afterwards exercised ; and the defendant claims in his accounts with the estate, as between him and the plaintiff, to be allowed what the defendant has so paid to Mr. Gaskell out of it, although the deceased (as has been stated) was only a surety to Mr. Gaskell for the defendant himself, who asserts this claim to be well founded, because (as he says) the meaning and effect of the terms of composition and arrangement that I have mentioned were so. But I have been unable to see any ground for the proposition. Certainly the deed does not contain expressly any such contract, nor is it a consequence following or to be gathered from the express agreement that I have specified, — an agreement with which it was consistent that the defendant should continue liable to indemnify the

* 183 estate of the deceased * from Mr. Gaskell's demand. The deed, taken alone, does not, I conceive, support the defendant's claim.

With regard to the letters, I am not sure that, in this controversy, they ought to be looked at, my impression being that no document but the deed can, for any present purpose, be regarded. But if the letters ought to be taken into consideration, they appear to me to make no difference, those before the deed not amounting to more, according to my understanding of them, than treaty or negotiation, though forming a correspondence which one would not have been at all surprised to find ending in a contract such as the defendant imputes to the plaintiff; but I see no evidence that they did so end ; and, as to the letters after the deed, they seem to me either to have nothing to do with the matter of the exceptions, or at least to contain no contract. There is no case for reforming or altering the deed, by addition or otherwise ; and, acceding to the Master's view, I think that the defendant's materials of every kind fail him upon the point of the exceptions.

I have not forgotten, though I have not mentioned, the connection of John Close the younger with the matters that have been under discussion. It makes no difference. Dying, as he did, in his mother's lifetime, he lost, upon that event happening, all title to participate in the residue of his father's estate.

THE LORD JUSTICE TURNER. — Perhaps the parties may have had the intention which has been imputed to them; but I am perfectly satisfied that, upon the construction of this deed, which, in my opinion, can alone be looked at, it is impossible to spell out such a contract as has been contended for.

*The simple case is this: John and James Close, who *184 carried on business in partnership, were indebted to Mr. Henry Gaskell in above 5000*l*. The estate of the testator, the father of John and James, was surety to Mr. Gaskell for the debt. John and James being unable to discharge their liabilities, a composition was agreed upon, upon the terms expressed in a deed, to which James was a party, in his character of executor of the testator. According to these terms, John and James were to pay Gaskell 15*s*. in the pound, in full satisfaction and discharge of the debt due to him; and, so far as John and James personally were concerned, their liability to Mr. Gaskell became not greater than that of paying 15*s*. in the pound upon the debt. But it is equally clear that, although their personal liability was not greater than this, the testator's estate represented by James was to continue liable to Gaskell for 5*s*. in the pound more. The consequence of this liability of the testator's estate was this: that, upon payment by that estate of the 5*s*. in the pound, there arose a new demand on the part of that estate against John and James for the full amount so paid. The question here is, whether, upon the face of the composition deed, there is any contract with respect to the liability of John and James which would arise in consequence of the payment of the 5*s*. in the pound by their father's estate, — whether there was a contract on the part of the father's estate that the claim of that estate to which I have referred against John and James individually should be given up.

In the first place, there could have been no such contract without a breach of trust on the part of James; for the beneficial interest in the testator's estate was given first to the widow for life, and then contingently to such of the sons as should be living at her death. It *is clear, therefore, that James *185 could not have entered into the contract contended for, otherwise than in direct breach of his duty as executor and trustee. In the next place, no such intention appears upon the face of the deed. In the recital there is no mention of any beneficial interest under the will: and no such contract as that contended for can

be collected unless clearly expressed in the deed. In the absence of such expression it cannot be implied. It is said that there is some question of fraud with reference to the arrangements between James and Thomas; but I think that there is no ground for any such imputation.

My decision is founded on the express reservation in the deed of Gaskell's rights against the surety's estate,¹ and the necessary consequence of such a reservation, which is the right to indemnity on the part of the surety's estate against the principal debtor.

1853. July 11, 12, & 29. Before the LORDS JUSTICES.

A widow who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise 2000*l.*, for her benefit, and subject thereto in trust to convey the estates as the testator's daughter by a former marriage should direct. The daughter borrowed money upon the security of a mortgage of some of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that the daughter had directed the widow and her co-trustee to make such conveyance as was thereafter contained, the widow and her co-trustee, as devisees in trust, by the direction of the daughter, conveyed the estates to the mortgagee upon trusts for sale and for payment of the mortgage debt, and of the surplus as the daughter should appoint, and subject thereto according to the trusts of the will: *Held*, —

1. That the mortgage did not pass the beneficial interest of the widow.
2. That, nevertheless, her charges must be postponed to the mortgage, she having concurred in it, without reserving her priority.²

THIS was an appeal from the decision of the late Vice-Chancellor Sir JAMES PARKER, confirming a finding of Master RICHARDS, as to priorities of incumbrances; and the question was as to the effect of the concurrence of an incumbrancer (but not in that character) in deeds creating subsequent incumbrances.

¹ See *Owen v. Homan*, 3 M'N. & G. 378, 406, and cases in note (1); S. C., 4 H. L. Cas. 997, 1038; *Wyke v. Rogers*, 1 De G., M. & G. 408; *Ex parte Harvey*, *post*, 881; *Kearsley v. Cole*, 16 M. & W. 128; 16 L. J. Ex. 115.

² *Post*, 196, n. (1) and cases.

By a settlement made in contemplation of the marriage of John Blackburne and Eleanor his wife, dated the 22d of October, 1798, Mr. Blackburne covenanted with the trustees of the settlement to convey and assign to them all the real and personal estate to which Eleanor should thereafter become entitled, upon trust for her absolutely, in the event (which happened) of her surviving him, and of there being no issue of the marriage. By the same settlement Mr. Blackburne demised to the trustees of the settlement, for the term of 500 years, a moiety of some salt works (to which he was entitled), upon trusts for securing to Eleanor a jointure of 500*l.* a year in the event of her surviving him, and he covenanted with the trustees for the payment of the jointure.

* In or previously to the month of August, 1807, Mr. * 187 Blackburne had received property of his wife's to which she had become entitled after the marriage, to the amount of 12,308*l.*; and by a deed dated the 11th of August, 1807, he mortgaged an estate and some shares to the trustees of the settlement, for securing 12,308*l.* By this deed he also charged all his real estates with the payment of the jointure. Mr. Blackburne afterwards received other moneys of his wife's to which she became entitled after the marriage, to the amount of 766*l.* 13*s.* 8*d.*

Mr. Blackburne by his will, dated the 3d of August, 1820, gave and devised to trustees, one of whom was his wife, all his real and personal estate, in trust in the first place by mortgage or sale to levy and raise so much money as would be sufficient to pay off and discharge his just debts, funeral and testamentary expenses, and the charges attendant upon the execution of the trusts thereby in them reposed; and in the next place the several legacies and annuities by him thereafter bequeathed. After giving an annuity, the testator directed his trustees to levy and raise a sum of 2000*l.* for the benefit of his wife; and as to all the residue of his real and personal estate, the trustees were to stand seised and possessed thereof, in trust for the sole and separate use of Alice Anna Hawkes, his daughter by a former marriage (who was the wife of Thomas Hawkes, one of the trustees of the will), for her life, for her separate use; and from and after the death of his said daughter, or during her life if she should so require and direct, notwithstanding her coverture, in trust to convey, transfer, and assign the same, and every or any part thereof, to such person and persons, upon such trusts as his daughter by any deed or will

to be executed by her should direct ; and in default of such
 * 188 appointment, in *trust from and after the death of the
 daughter, if Thomas Hawkes should have survived her, and
 she should not have made any disposition thereof to the contrary
 to apply the yearly rents, dividends, interest, and annual produce
 thereof (or of so much thereof as might not have been so directed,
 limited, appointed, given, bequeathed, or charged) to the said
 Thomas Hawkes during his life, for his own use and benefit, for the
 maintenance and support of himself and his children by the tes-
 tator's said daughter, and for the advancement in the world of
 such children in such manner as he should think fit, free from the
 power or control of his creditors, and so that the same should not
 be subject to any mortgage, sale, assignment, transfer, or other
 disposition to be made by him thereof. And from and after the
 death of the daughter and Thomas Hawkes, in case the daughter
 should survive Thomas Hawkes, and should not have made any
 disposition to the contrary, in trust for the children, with an ulti-
 mate trust for Mrs. Hawkes.

Mr. Blackburne died in the month of November, 1826, without
 ever having had issue by his wife Eleanor. He left his wife Elea-
 nor and Mrs. Hawkes and her husband surviving him. The will
 was proved by Eleanor Blackburne, Thomas Hawkes, and another
 executor, who died before the year 1832.

In the year 1832, Mr. and Mrs. Hawkes borrowed of Joseph
 Redish the sum of 5000*l.*; and in the year 1835 they borrowed of
 John Holmes and William Rushton the sum of 5650*l.* These
 sums were secured to Redish and Holmes and Rushton respec-
 tively, by mortgages of parts of the real estates of the testator
 John Blackburne, dated respectively the 12th of June, 1832, and
 the 30th of October, 1835; and the question was as to the effect of

Eleanor Blackburne having been a party to the deeds by
 * 189 which *these mortgages were created. The mortgage of
 1832 was made between Eleanor Blackburne and Thomas
 Hawkes (described as surviving devisees in trust of the will of
 John Blackburne), of the first part, Thomas Hawkes and Alice
 Anna his wife (described as the only child and heiress-at-law of
 John Blackburne), of the second part, and Joseph Redish of the
 third part. It recited, first, the seisin of John Blackburne of
 the estate which the deed afterwards purported to convey. Then
 it recited the will of John Blackburne, and that Thomas Hawkes

and Alice Anna his wife, having occasion for the sum of 5000*l.*, had applied to Joseph Redish to advance and lend them that sum, which he consented to do, on having the repayment thereof secured in manner hereinafter expressed. Then it recited as follows: "And whereas the said Alice Anna Hawkes hath required and directed the said Eleanor Blackburne and Thomas Hawkes, as such surviving devisees in trust as aforesaid, to make such conveyance as is hereinafter contained, which they have agreed to do." The operative part, contained an appointment by Mrs. Hawkes under her power, and a release by Mrs. Blackburne and Mr. and Mrs. Hawkes, by which Mrs. Blackburne and Mr. Hawkes, "as such surviving devisees in trust, executrix and executor as aforesaid, at the request and by the direction of the said Alice Anna Hawkes," granted and released, and Mrs. Hawkes herself also granted and released to the mortgagee the parcels, "and all the estate and several estates, right, title, interest, use, trust, inheritance, and property, possibility, term, claim, and demand whatsoever, both at law and in equity, of them the said Eleanor Blackburne, Thomas Hawkes, and Alice Anna his wife, or any one of them," in the hereditaments thereby assured. The security was by way of trust for sale, with a declaration that in the mean time the mortgagee, his heirs and assigns, should stand seised * of the hereditaments upon trusts for securing * 190 the 5000*l.* and interest, and subject to these trusts upon trust for payment of the residue of the moneys, if any, to arise from the sale, and to convey and assure such part or parts of the estates as should not have been sold, to such person or persons and for such estates as Alice Anna Hawkes should appoint, and in default of any such appointment, then that the mortgagee, his heirs, executors, administrators, or assigns, should pay such surplus moneys, and convey and assure such part or parts of the said manors, messuages, lands, hereditaments, and premises as should remain unsold and unappointed, under the trusts aforesaid, to the trustees or trustee for the time being of Mr. Blackburne's will, their, his, or her heirs, executors, administrators, and assigns, upon the trusts therein contained, or such of them as should be subsisting and capable of taking effect. There were covenants by Mr. Hawkes for himself and for his wife, and also for Mrs. Blackburne, for title and further assurance. And there was a covenant by Mrs. Blackburne with Redish that she had not at any time incumbered

the estates. The deed closed with a declaration by which it was declared and agreed between all the parties that all terms of years in the premises should be held in trust, in the first place, for further and better and more effectually securing the repayment of the 5000*l.* and interest to Redish, according to the true intent and meaning of the deed; and from and after the payment thereof, in trust to attend the freehold and inheritance.

The deed of 1835 was in precisely the same form, except that at the close of the description of the parcels there was excepted the interest of Mrs. Blackburne in the salt works.

* 191 In the month of May, 1842, Mrs. Blackburne assigned * the 12,308*l.* secured by the mortgage of 1807, to the plaintiff, Sir James Matthew Stronge; and by her will, dated the 2d of May, 1839, she appointed the plaintiff to be her executor. She died on the 2d of July, 1842, and the plaintiff proved her will.

The jointure annuity of 500*l.* a year and the interest of the 12,308*l.* and 766*l.* 13*s.* 8*d.*, and on the legacy of 2000*l.*, were duly paid to Mrs. Blackburne up to the 1st of December, 1838, but after that time both the annuity and the interest fell into arrear, and at the time of Mrs. Blackburne's death there was due to her, in respect of the arrears of the annuity, 1791*l.* 13*s.* 4*d.*, and in respect of the interest on the 12,308*l.* and 766*l.* 13*s.* 8*d.*, 1797*l.* 11*s.* 10*d.* The 766*l.* 13*s.* 8*d.* and the legacy remained unpaid, and the interest on the legacy was also in arrear from the 1st of December, 1838.

The appeal was from an order of the late Vice-Chancellor PARKER, affirming the finding of the Master, by which, in effect, priority was given to Mrs. Blackburne's charges upon the testator's real estates in respect of the jointure, the covenant, and the legacy, over the mortgages in favour of Mr. Redish and of Messrs. Holmes and of Rushton; and the question was, whether this priority had been rightly given.

Mr. Malins and *Mr. M. Archer Shee* supported the appeal.

Mr. Wigram, *Mr. Willcock*, and *Mr. R. Harrison* were for the respondents.

The following cases were cited: *Payler v. Homersham*, (a) *Bragbrooke v. Inskip*, (b) *Squire v. Ford*. (c)

(a) 4 *Man. & Sel.* 423.

(b) 8 *Ves.* 417.

(c) 9 *Hare*, 47.

* THE LORD JUSTICE KNIGHT BRUCE. — Upon the argu- * 192
ment of this case, — an appeal from an order made on ex-
ceptions, — evidence, oral and documentary, which was before
neither the Master nor the Vice-Chancellor who made the order,
was, by consent, adduced and used, after considering which, we
thought it right to ask *Mr. Wigram*, the leading counsel for the
respondent, whether he would wish that there should be an inquiry
into the circumstances under which the securities in question were
prepared and (especially by *Mrs. Blackburne*) executed. This
was declined by *Mr. Wigram*, on the ground of the unlikelihood
or impossibility of adding usefully to the materials already in the
possession of the Court, — a view of the matter very probably cor-
rect. We did not make a similar suggestion to the appellant's
counsel, thinking it not at all likely that any such desire would be
felt on their part.

Upon the whole of the documents and evidence now before us,
both what was presented and what was not presented to the Master
and the Vice-Chancellor, I think that there is no ground for say-
ing that, if any fraud or deception (whether by misrepresentation
or otherwise) was practised on *Mrs. Blackburne*, it was practised
by or on behalf, or with the privity, of the persons to whom the
securities were made respectively, or any one or more of those
persons. I think that each of them must be taken to have acted
fairly, and that neither security can be deemed to have been exe-
cuted by *Mrs. Blackburne* under circumstances entitling her to
have it reformed or to be relieved against it. The instruments, as
they stand, must be taken to have bound her legally and equitably;
but it is contended for the respondent that, even as they stand,
they left her at liberty to enforce against the mortgagees or incum-
brancers, parties to them respectively, all the equitable
rights affecting the * lands comprised in them, which, * 193
under *Mr. Blackburne's* will and her title anterior to the
will, she was, immediately before the security of 1832, as to the
lands comprised in that security, and immediately before the secu-
rity of 1835, as to the lands in that, entitled to enforce for her
own benefit.

If the respondent is well founded in this contention, *Mrs. Black-
burne*, immediately after executing the deeds of 1832, might, as a
creditor and legatee of *Mr. Blackburne*, have filed a bill against
Mr. Redish for a receiver of the rents, and a sale of the property

comprised in them, and so have deprived him wholly of the benefit of his security. I find myself unable to put such a construction upon the transaction, — unable to believe that his money was lent, or understood by any person to be lent, upon terms to which it would have been so much more than imprudent on his part to assent. True, Mrs. Blackburne only conveyed as a devisee in trust and as executrix; but she so parted with all the legal interest vested in her; and, if it had been intended that she should, nevertheless, retain for her benefit an equitable interest paramount the security, it must, I think, be supposed that so extraordinary an intention would have been expressed or intimated, which it is not.

The language of the security of 1832, throughout the instrument, appears to me tantamount to a declaration by Mrs. Blackburne to Mr. Redish that she had not at the time any interest in the lands comprised in that security, or any claim upon them, beyond what she expressly conveyed, or that, if she had, she did not intend to enforce it against him; and justice, in my opinion,

requires us to presume that he so considered the matter, and

* 194 on that faith advanced his money and * took the security.

The same observations apply, I conceive, *mutatis mutandis*, to the security of 1835.

My excellent friend Mr. RICHARDS, first, and Sir JAMES PARKER, who, nearly at the close of his valuable life, made the order under appeal afterwards, having come to a different conclusion, I have hesitated in this matter, and distrusted my view of the case. Finally, however, entertaining that view, I am bound to act upon it.

With regard to the evidence, *dehors* the deed, I may say that, as its addition to the cause has not appeared to me to help the respondent, so neither would its rejection, wholly or partially, have been, I conceive, of any avail to him. It is true, certainly, that at one time I doubted whether the correspondence and the drafts might not reasonably be contended to assist him. Upon reflection, however, I think that to attribute any weight to them would be to act on insufficient grounds, and, in truth, on mere conjecture. The consequence is, that, whatever reason Mrs. Blackburne may possibly have had, though I am not sure that she had any, to complain of some person or persons near to her or about her, — hard as the case may perhaps be on that lady or her representative, we

are placed, I apprehend, under the necessity of postponing Sir James Stronge to the appellants.

The Lord Justice TURNER, after stating the facts of the case, said: The question seems to depend upon two points. First, whether the mortgage-deeds of 1832 and 1835 operated to pass the interests which Eleanor Blackburne had in the testator's estate in respect of the jointure, the covenant, and the legacy; and, secondly, whether, assuming *that these interests did *195 not pass by the mortgage-deeds, but remained in Mrs. Blackburne, it was competent to her and those claiming under her to set them up against the mortgagees, notwithstanding her execution of the mortgage-deeds.

The first of these mortgage-deeds is dated the 12th of June, 1832. [His Lordship read it.] The other mortgage-deed is in precisely the same form, except that at the end of the parcels there is the following saving: — [His Lordship read it.]

Upon examining these deeds I am satisfied that they were not intended to operate so as to pass the interests of Eleanor Blackburne in the testator's estate in respect of the jointure, the covenant, and the legacy. The reasoning of the Vice-Chancellor upon that part of the case appears to me to be conclusive; but, if it required further support, I think that support would be found in the very frame of the deeds themselves. No purchaser or mortgagee intending to acquire the beneficial interests of Mrs. Blackburne could, as I conceive, have been content to rest the requisition of them upon such deeds as these. Had the deeds been intended to pass Mrs. Blackburne's beneficial interests, there must surely have been some recital of the existence of such interests, some clear and distinct assignment of them, and some equity of redemption reserved to Mrs. Blackburne in respect of such assignment, the deeds indicating no intention on the part of Mrs. Blackburne to give up her interests in favour of Mrs. Hawkes. The case, therefore, upon the first point, seems to me to be reduced to this, whether the operative words of these deeds are so strong as to compel the court to hold that Mrs. Blackburne's beneficial interests passed by them, notwithstanding the indication of intention to be drawn from the other parts of the deeds; and I am *of opinion that they are not, but the contrary. I think *196 that the words "as such surviving devisees in trust exec-

utor and executrix as aforesaid" override the whole operative parts of the deeds, and have the effect of confirming them to the interests which the conveying parties had as trustees in conformity with the intention to be collected from the other parts of the deeds. If, therefore, this case had rested upon the first point to which I have referred, I should have felt no hesitation in agreeing with the conclusion at which the late Vice-Chancellor arrived.

But the more substantial question in the case seems to me to arise upon the second point to which I have adverted; whether it could be competent to Mrs. Blackburne and those claiming under her to set up her interests in respect of the jointure, the covenant, and the legacy, against the mortgagees, after her having joined in the mortgage-deeds. It has long been settled that where a party having a charge upon an estate, encourages or even permits another to advance money upon the security of the estate without giving notice of the charge, the party who has thus been encouraged or permitted to make the advance is entitled to priority over the party who has thus encouraged or permitted the advance to be made. The fact of the party having the charge standing by and permitting the further advance to be made, without giving notice of the charge, is alone sufficient to support this equity on the part of the subsequent incumbrancer. The equity is still more strong where the party having the charge has participated in the transaction of the subsequent loan, or has made representations leading the other party to believe in the non-existence of the prior charge.¹

There are many cases which support this doctrine.
 * 197 *The case of *Draper v. Borlase* (a) is perhaps the most apposite to the present. In that case a Mr. Hill had lent Borlase 2000*l.* upon mortgage of a manor, and upon a statute as a further security; and he afterwards, being at the bar, advised a Mr. Ive on lending Borlase another sum of 2000*l.* on mortgage of a different manor, and prepared the security, and inserted a cov-

(a) 2 Vern. 370.

¹ See, as to this, 2 Smith Lead. Cas. (5th Am. ed.) 619 [459; and 460], and cases cited, 642 *et seq.* and cases cited; 2 Story Eq. Jur. § 1542; *Cornish v. Abington*, 4 H. & N. 549; *Wells v. Pierce*, 27 N. H. 503; 2 Lead. Cas. in Eq. (3d Am. ed.) 64, 65; *Carr v. Wallace*, 7 Watts, 100; *Higgins v. Ferguson*, 14 Ill. 269; *Andrews v. Lyons*, 11 Allen, 349; *Chouteau v. Goddin*, 39 Mo. 229; *Davidson v. Young*, 38 Ill. 145; *Cady v. Owen*, 34 Vt. 598; *Philhower v. Todd*, 3 Stockt. (N. J.) 312; *Sahler v. Singer*, 44 Barb. (N. Y.) 606.

enant that the estate was free from incumbrances, making no mention of the statute. It was held that he could not set up the statute against the incumbrance of Ive. That case seems to me in principle to govern, and in its circumstances to be much less strong than the present. Mrs. Blackburne was party to the deeds by which these mortgages were created. Those deeds, upon the face of them, appear to me most plainly to import that she had no charge upon the mortgaged estates. The parts of the estates which remain unsold are to be reconveyed to Mrs. Hawkes's appointment, and to the trustees only in default of appointment by Mrs. Hawkes. All terms are to be held in trust, in the first place, for securing the mortgagees. These provisions cannot, I think, be considered otherwise than as amounting to a clear representation, by Mrs. Blackburne, that there was not, on her part at least, any prior claim under the trust.

It was said that the deed recited the trust for the payment of the debts and legacies, and did not recite that the debts and legacies had been paid, and that the mortgagees therefore were put upon inquiry, and so no doubt they were; but these deeds contain Mrs. Blackburne's answer to the inquiry in the representation which their provisions necessarily convey, that she did not intend to set up any charge upon the estate as against the mortgagees.

* If it could have been observed on her part that her execution of the deeds had been fraudulently procured, the case would have been different; and it was for this reason we offered an inquiry upon the subject, but the inquiry was, and I think wisely, declined. Upon the facts as they stand I am satisfied that it would be going much too far to cut down the effect of the representations which the deeds import upon any presumption of fraud on Mrs. Blackburne, or of ignorance on her part of the true effect of the deeds. Some reliance was placed on the part of the plaintiff upon a note with reference to the legacies and annuities which appears upon the draft of one of the mortgage-deeds with reference to the legacies and annuity, to the following effect: "These appear to be a charge upon all the real estate devised. Have the legacies been paid, and is the annuity subsisting? If so, is the rental an ample security beyond the annuity?" but this note, although it shows that the mortgagee of 1832 was aware of the charge, shows nothing to countervail the effect of the deed as representing that the parties with whom he was dealing had no inter-

est under the charge. The correspondence which is in evidence was also relied on upon the part of the plaintiff, but I see nothing in it which can affect the case so far as Mrs. Blackburne is concerned.

There is another fact in this case which I think is entitled to no inconsiderable weight. It appears by the report that not only did the 766*l.* and the legacy remain unpaid when the mortgages were made, but that Mrs. Blackburne's annuity and her interest must have been in arrear for some considerable period antecedent to her death; and yet no proceedings were taken by her for the purpose of disturbing the title of the mortgagees. This is a claim

brought forward by the plaintiff after her death against a
 * 199 title which she may not reasonably be * said to have acquiesced in. Upon the whole, therefore, my opinion is that, as between the plaintiff and these mortgagees, the plaintiff's charge must be postponed.

THE QUEEN, on the Prosecution of SIR JAMES BROOKE v.
 THE EASTERN ARCHIPELAGO COMPANY.

1854. April 19, 20. June 3. July 1 and 15. Before the Lord Chancellor
 Lord CRANWORTH.

After a judgment in *scire facias* in the Court of Queen's Bench, annulling letters-patent, and directing that they should be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment, his duty in cancelling the enrolment being only ministerial. Where a petition is presented in the petty bag in Chancery to the Lord Chancellor, the clerk of the petty bag is the proper officer to draw up the order pronounced on such petition.

THIS was a petition of the above company. The following are the circumstances out of which the petition was presented to the Lord Chancellor. It appeared that the company obtained, on the 17th July, 1847, a charter of incorporation for the purpose among other things of working certain coal mines in the island of Labuan. The charter provided that the sum of 100,000*l.* at the least, being one-half of the capital of the corporation, should be subscribed for within twelve calendar months from the date of the charter, and that the sum of 50,000*l.* at the least should be paid up within

such period, and that a proper deed of copartnership and settlement should be executed by the members. It also provided and directed that the partnership should not begin business until it should have been certified to the president of the board of trade by at least three of the directors of the company, that at least one-half of the capital before mentioned should have been subscribed for, and the said sum of 50,000*l.* at the least paid up, such certificate of the directors to be indorsed * on the * 200 charter, and to be sufficient evidence for the purpose of the aforesaid provisions in that behalf. It also provided that in case the corporation should fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period before limited in that behalf, and subject as aforesaid, or in case the corporation should not comply with any other the directions and conditions in the charter, it should be lawful for her Majesty, her heirs and successors, by any writing under the great seal, or under the sign-manual of her Majesty, her heirs or successors, to revoke and make void the said royal charter, and every other cause, matter, or thing, therein contained, either absolutely or under such terms and conditions as she or they should think fit.

Before the expiration of the first year after the date of the charter, the chairman of the company reported to the board of trade the difficulties under which the company laboured, and apprehending that it would be impossible to call up the required amount within the period prescribed by the charter, inquired whether it would be correct to include in the return to the board the value of the rights and property which the company had acquired as money's worth, and as part of the paid-up capital of the company. This course was sanctioned by the board of trade, and accordingly five directors of the company certified to the board of trade that the requisite amount of the capital had been subscribed for and paid up, — the sum of 50,000*l.* being composed of 4000*l.* paid up, and 46,000*l.*, the value of the property of the company.

Under these circumstances Sir JAMES BROOKE presented a memorial to the Attorney-General praying him to grant his fiat for the issuing of a *scire facias* * against the company for * 201 the repeal of the charter, on the ground that the representations made to the government, on the faith of which the charter was granted, were false representations, and also that the

subsequent conditions, on the due performance whereof the efficiency and liability and success of the company depended, had never been performed. On the 17th March, 1852, the writ was granted, and issue being joined by the company the case came on to be heard on the 19th June, 1852, before Lord Chief Justice CAMPBELL, when a verdict was given in substance for the Crown, to the effect that a moiety of the capital required by the charter had not been paid up, and that the corporation had commenced business without such payment. On a rule to arrest judgment, on the ground that the declaration did not show that the Queen had by writing under the great seal or sign-manual revoked the charter, coming on to be heard before the Court of Queen's Bench *in banco*, the Judges were equally divided, and the rule dropped; the judgment therefore *quod cancelletur* was not arrested, but was given for the Crown. (a) A writ of error having been brought against that judgment into the Exchequer Chamber on the 22d November, 1853, a majority of the Judges in the Exchequer Chamber were of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. (b)

On the 30th November, 1853, the company presented a memorial and petition to the Queen in council, praying that her Majesty, on due consideration of all the circumstances of that most unusual case, would be pleased to instruct the Attorney-General to enter a *nolle prosequi* in this suit, so as to prevent the revocation of the

charter and the consequent interruption or violation of the
 * 202 company's * existing arrangements and engagements, or otherwise to grant a new charter. The memorial and petition being still pending, and the prosecutor having taken steps to perfect the judgment obtained against the company and to procure the charter to be brought into the Court of Chancery to be cancelled, the petition prayed that all further proceedings in the action of *scire facias* in which judgment had been given for the Crown might be stayed, either wholly or until such time as the pleasure of her Majesty, in respect of the memorial presented to her by the petitioners, was declared.

Mr. Rolt and *Mr. Freeling*, in support of the petition. — The mode of revocation indicated by the charter was an express power,

(a) 1 El. & Bl. 310.

(b) 2 El. & Bl. 568.

and superseded the implied power of revocation. It was therefore necessary, before any *scire facias* issued, that there should be a revocation by writing under the great seal, or by sign-manual, for the condition alleged to be broken. This view of the case was adopted by two of the learned Judges in the Court of Queen's Bench: (a) it would, therefore, be a just exercise of the Lord Chancellor's authority to direct the stay of proceedings until the result of the memorial should be ascertained. Not only was there no *mala fides*, but the directors have acted under the advice of the very board which might be said to represent the sovereign, inasmuch as it was the department to which all such matters are referred.

[THE LORD CHANCELLOR. — If that were so, it would follow that the board might at all times exercise a power to prevent a third party from suing out a *scire facias*.]

* They referred to *Reg. v. Neilson*, (b) where, in the * 203 analogous case of a patent, the effect of the order which was pronounced was virtually to arrest proceedings in *scire facias*; and to *Reg. v. Prosser*, (c) as to the authority of this Court to control the Attorney-General.

Mr. J. V. Prior and *Mr. C. M. Roupell*, contra. — The judgment of the Exchequer Chamber is to the effect that the right of the subject to sue out the writ of *scire facias* is not taken away by the power reserved by the Crown in the charter: "Non poterit rex gratiam facere cum injuriâ et damno aliorum." (d) We submit that, by that judgment, the charter was null and void, and that even the Attorney-General could not then enter a *nolle prosequi*; that this Court was merely ministerial, and that, though the letters-patent might remain in Chancery, yet that the Court of Queen's Bench might give judgment that they be revoked and cancelled. *Bynner v. The Queen*. (e)

The Lord Chancellor, upon being furnished with that authority, observed: The judgment of the Queen's Bench in *Bynner v. The*

(a) 1 El. & Bl. 310.

(c) 11 Beav. 306.

(b) Webst. Pat. Cas. 665.

(d) Bracton, cited by Lord Coke in the 3d Institute, p. 237.

(e) 9 Q. B. 523; see p. 550.

Queen (a) was in the following words: "That the said letters-patent be revoked, cancelled, vacated, disallowed, annulled, void and invalid, and be altogether had and held for nothing, and also that the enrolment thereof be cancelled, quashed, and annulled, and that the said letters-patent be restored into her said Majesty's Court of Chancery at Westminster aforesaid, there to be cancelled." Nothing more could be done by the Attorney-

* 204 General in * this case, just as nothing more can be done by him after judgment in a criminal prosecution or capital felony. There can be no more prosecution of a suit by him after judgment, which nothing can affect but a writ of error. The only reason for coming here is, that the enrolment remains in this Court, but final judgment has been entered up. With reference to that point, the Lord Chief Justice TINDAL, in the case of *Bynner v. The Queen*, (b) after a careful examination of the authorities, observes, "It was objected that, although this might be the practice where a final judgment might be given and execution had thereon in the Court of Queen's Bench, yet that in this case more remained to be done in the Court of Chancery, and which could not be done elsewhere, namely, that the letters-patent and the enrolment thereof, which still remained in the Court of Chancery, are directed to be cancelled. But it seems a sufficient answer to this objection, that nothing remains to be done in the Court of Chancery but a mere ministerial act by the officers of that Court; and it is clear there is no difficulty in getting an exact transcript of the record of the judgment from the Court of Queen's Bench to the Court of Chancery by *certiorari* and *mittimus*." I, as one of the Judges in the Exchequer Chamber, fully concurred in that judgment; and, in my opinion, the present case is concluded by that authority.

I have not the least hesitation in saying, that the facts disclosed entirely absolve the gentlemen who signed the certificate from all moral imputation; they acted on the advice of the board of trade. The Queen's Bench, however, cannot be bound because the petitioners and the board of trade were acting under a common error. The application, therefore, for a stay of proceed-

* 205 ings, * under the circumstances, is simply absurd, and, being entirely unfounded, must be dismissed with costs.

(a) 9 Q. B. 523; see p. 550.

(b) 9 Q. B. 523; see p. 552.

On the 3d of June, the matter was again mentioned to the Lord Chancellor, there being some doubt as to whether the registrar, or the clerk of the petty bag, or the Lord Chancellor's secretary, or the clerk of the patents, was the proper officer to draw up his Lordship's order.

The Lord Chancellor held that it was the duty of the clerk of the petty bag.

On the 1st July, *Mr. J. V. Prior* moved, on the part of the prosecutor, that the company be ordered to bring in their letters-patent to be cancelled. The Lord Chancellor made the order. The company were thereupon formally called upon to appear, and, not appearing, an order *nisi* for the cancellation of the letters-patent was made. On the 15th July, the case was again brought before the Lord Chancellor, the clerk of the petty bag attending with the original charter, and the defendants, by their counsel, appearing and consenting, the seal was cut off, and the enrolment was vacated.

• ATTORNEY-GENERAL v. CHAMBERS.¹

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1854. June 6. July 8, 15. Before the Lord Chancellor Lord CRANWORTH, assisted by Mr. Baron ALDERSON and Mr. Justice MAULE.

In the absence of all evidence of particular usage, the extent of the right of the Crown to the sea-shore landwards is *prima facie* limited by the line of the medium high tide between the springs and the neaps.²

¹ S. C., 4 De G. & J. 55.

² See *Attorney-General v. Jones*, 2 H. & C. 347; *Paterson and Newark R.R. Co. v. Stevens* (N. J.), 10 Am. Law Reg. N. S. 165. The sea-shore must be understood to be the margin of the sea, in its usual and ordinary state. Thus, when the tide is out, low-water mark is the margin of the sea; and when the sea is full, the margin is high-water mark. The sea-shore is, therefore, all the ground between the ordinary high-water mark and low-water mark. PARSONS C. J., in *Storer v. Freeman*, 6 Mass. 439; *Doane v. Wilcott*, 5 Gray, 385. Ordinary high-water mark seems to be the line of high water at ordinary tides. *Porter v. Sullivan*, 7 Gray, 443; *Commonwealth v. Charlestown*, 1 Pick. 182; *Brown v. Lakeman*, 17 Pick. 444; *Commonwealth v. Roxbury*, 9 Gray, 477, 482, 483, 491, and note to that case; *Cortelyou v. Van Brandt*, 2 John. 362; *Galveston v. Menard*, 28 Texas, 399; *Peyroux v. Howard*, 7 Peters, 343; *Howard v. Ingersoll*, 13 How. (U. S.) 321, 323, 324; Angell, *Tide Waters*

IN this case an information was filed by the Attorney-General against the owners and lessees of a district abutting on and extending along the sea-shore of the parish of Llanelly, in the county of Carmarthen. The information alleged that by the royal prerogative the sea-shore, and the soil of all arms and creeks of the sea, and of all public ports and havens round this kingdom as far as the sea flows and reflows between high and low water mark, and the soil of the navigable rivers of this kingdom, and all mines and minerals lying under the sea, sea-shore, arms and creeks of the sea, and all profits arising from the shore and soil belonged to her Majesty, and have at all times belonged to her and her royal predecessors, kings and queens of this realm. The information stated that there were very valuable and extensive veins, seams or strata of coal and culm lying under that part of the parish of Llanelly which was contiguous to the sea-shore, and particularly under the land belonging to the defendant David Lewis, called or known by the name of Old Castle Farm, and that such veins, seams, or strata of coal and culm continued and extended also under the contiguous sea-shore below the line of high-water mark and under the sea.

The information charged that the sea-shore, which was vested in her Majesty by virtue of her prerogative, extended landwards as far as high-water mark at ordinary monthly spring-tides, or at all events far beyond high-water mark at neap-tides, and up to the medium line of high-water mark between neap and
 * 207 spring tides. The * information charged that encroach-

(2d ed.), 68 *et seq.* Under the colonial ordinance of Massachusetts, 1647, the ebb of the tide, when from natural causes it ebbs the lowest, and not the average or common ebb, is to be taken as the low-water mark. *Sparhawk v. Bullard*, 1 Met. 95, 107; *Angell, Tide Waters* (2d ed.), 72; but see *Gerrish v. Union Wharf*, 26 Maine, 395, 396. "Low water is the furthest receding point of ebb-tide." WAYNE J., in *Howard v. Ingersoll*, 13 How. (U. S.) 417. As to the ownership of the shore, under the colonial ordinance, 1647, above referred to, see *Storer v. Freeman*, 6 Mass. 435, 438, 439; *Porter v. Sullivan*, 7 Gray, 441; *Commonwealth v. Charlestown*, 1 Pick. 182; 9 Gray, 318 *et seq.*, in note to *Commonwealth v. Roxbury*. In England, *Woolrych, Waters* (2d Eng. ed.), 433 *et seq.*; *The Paterson and Newark R.R. Co. v. Stevens*, 10 Am. Law Reg. (N. S.) 165; *Houck, Law of Nav. Rivers*, §§ 241, 243. Ownership of the shores of navigable waters and the soil under them is in the state, in which they are situated, as sovereign. *Houck, Law of Nav. Rivers*, § 121 *et seq.*, § 263; *Martin v. Waddell*, 16 Peters, 410; *Pollard v. Hagan*, 3 How. U. S. 212; *Godtitle v. Kibbe*, 9 How. (U. S.) 471.

ments had been made by the defendants on the shore by means of embankments; and that valuable coal mines were worked under that part of the shore that lay to the seaward of high-water mark at ordinary neap-tides before the sea was excluded by the embankment.

The information prayed that the right of her Majesty to the sea-shore of the parish of Llanelly below high-water mark might be established; that the leaves or licenses to embank, or build, or dig, or raise coal from the said sea-shore might be declared null void, and delivered up to be cancelled, and that the boundary or mark to which the sea flowed at high ordinary tides upon the shore of the parish of Llanelly, adjoining the lands in the occupation or possession of the defendant D. Lewis, before the embankments were erected, and also those portions of the works or mines from which coal or culm were gotten, which lay under land belonging to her Majesty, might be ascertained and distinguished, and that the nuisances arising from the erection of the works might be abated.

Answers were put in by the several defendants, controverting the right asserted by the Crown, and submitting that at the utmost the Crown's right did not extend landwards beyond the line of high-water mark of ordinary neap-tides, and did not embrace any alluvium of gradual formation.

The cause originally came on to be heard before the Master of the Rolls, and on the 21st January, 1852, his Honor directed certain issues to be tried between the Crown and Lord Cawdor, and Mr. Chambers (two of the defendants and principal owners of the shore); no issue, however, was directed as between the Crown * and the defendant D. Lewis, who was also an * 208 owner, the Attorney-General having been of opinion that the issues between the Crown and the two principal defendants should be first disposed of. The issues came on to be tried on a trial at bar before a jury at the Queen's Bench, sitting *in banco* on the 19th February, 1854, when a verdict by agreement was entered for the Crown. The Act 15 & 16 Vict. c. 86, having in the mean time passed (by the 62d section of which a Court of Equity is empowered to determine the legal rights of parties without directing a trial at law), and the question, so far as regarded the rights of the defendant Lewis, being still undecided, it was arranged that the cause should be set down on further directions,

to be heard by consent of the Lord Chancellor, before his Lordship in the first instance, assisted by two of the Judges of the Courts of Common Law. His Lordship having accordingly invited the attendance of Mr. Baron ALDERSON and Mr. Justice MAULE to assist in the determination of the question, those learned Judges now attended.

The following passages from Lord Chief Justice HALE's Treatise De Jure Maris (*a*) were much commented upon in the argument, and by the learned Judges and Lord Chancellor, and are here inserted for the convenience of reference: —

“The shore is that ground that is between the ordinary high-water and low-water mark. This doth *primâ facie* and of common right belong to the King, both in the shore of the sea, and the shore of the arms of the sea.

“And herein there will be these things examinable, —

“1st. What shall be said the shore or *littus maris*?

“2d. What shall be said an arm or creek of the sea?

* 209 * “3d. What evidence there is of the King's propriety thereof.

“I. For the first of these it is certain that that which the sea overflows, either at high spring-tides, or extraordinary tides, comes not as to this purpose under the denomination of *littus maris*; and consequently the King's title is not of that large extent, but only to land that is usually overflowed at ordinary tides. And so I have known it ruled in the Exchequer Chamber in the case of Vanhaesdanke, on prosecution by information against Mr. Whiting, about 12 Car. 1, for lands in the county of Norfolk, and accordingly ruled, 15 Car. B. R., Sir Edward Heron's case and Pasch, 17 Car. 2, in *Scaccario* upon evidence between the Lady Wansford's lessee and Stephens, in an *ejectione firmæ* for the town of Cowes, in the Isle of Wight. That therefore I call the shore that is between the common high-water and low-water mark, and no more.

(*b*) “There seems to be three sorts of shores or *littora marina*, according to the various tides; viz., —

“ (1st) The high spring-tides, which are the fluxes of the sea

(*a*) Hargrave's Tracts, pp. 12, 25, 26.

(*b*) Hargrave's Tracts, p. 25.

at those tides that happen at the two equinoctials; and certainly this doth not *de jure communi* belong to the Crown. For such spring-tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject. And this is admitted of all hands.

“(2d) The spring-tides which happen twice every month, at full and change of the moon, and the shore in question, is by some opinion not denominated by these tides neither, but the land overflowed with these fluxes ordinarily belong to the subject *prima facie*, unless the King hath a prescription to the contrary.

* And the reason seems to be, because for the most part the * 210 lands covered by these fluxes are dry and maniorable; for at other tides the sea doth not cover them, and therefore touching these shores, some hold that common right speaks for the subject, unless there be an usage to entitle the Crown; for this is not properly *littus maris*. And therefore it hath been held that where the King makes his title to land as *littus maris*, or *parcella littoris marini*, it is not sufficient for him to make it appear to be overflowed at spring-tides of this kind, P. 8, Car. 1, in *Camera Scaccarii*, in the case of Vanhesdanke for lands in Norfolk; and so I have heard it was held, P. 15, Car. B. R., Sir Edward Heron's case, and Tr. 17, Car. 2, in the case of the Lady Wandesford, for a town called the Cowes, in the Isle of Wight, in *Scaccario*.

“(3d) Ordinary tides or neap-tides, which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum*. And touching this kind of shore, viz., that which is covered by the ordinary flux of the sea, is the business of our present inquiry.”

The Solicitor-General, Mr. James, and Mr. Hansen, for the Crown.—By the feudal law all the real property of this country was vested in the Crown, and the sea-shore appertaining to the sovereign commences with that portion of the shore where the interests of the public may be said to begin; and therefore the rights of the adjacent freeholders are bounded not merely by the ordinary flux and reflux of the tide, but the Crown for the benefit of the public has a right to all the intervening space between the highest and the ordinary high-water mark; for though the soil of the sea between high and low water mark may be parcel of

* 211 the manor of a subject, *Constable's Case*, (a) yet, as Lord HALE, in his Treatise De Jure Maris, says, p. 22, this "*jus privatum* that is acquired to the subject either by patent or prescription must not prejudice the *jus publicum* wherewith public rivers or arms of the sea are affected for public use." Mr. Justice BAYLEY, in the case of *Scratton v. Brown*, (b) observes, "The property in such land *prima facie* is in the Crown," and it is quite clear that if the sea encroach upon the land of a subject gradually, the land thereby covered by water belongs to the Crown; in *The Matter of the Hull and Selby Railway*, (c) *Rex v. Lord Yarborough*. (d) The limit to which the Crown would be entitled by the rule of the civil law will give us more than we claim; by that law the shore is defined to be so far as the greatest winter tides do run.

[ALDERSON, B., referred to the observations of HOLROYD, J., in the case of *Blundell v. Catterall*, (e) as to the variance between the common law and civil law in regard to maritime rights, showing that the civil law was not any guide in such matters.]

With reference to the word "ordinary," that must be intended to comprehend such phenomena as are of the most constant recurrence, and the word itself is just as applicable to spring as neap tides. (g)

They referred to *Berry v. Holden*, (h) *Attorney-General v. Burridge*, (i) and *Attorney-General v. Parmeter*, (k) Lord Stair's Institutes, Vol. II. p. 190. They also relied upon the observations attributed to Lord BROUGHAM in the case of *Smith v. The Earl of Stair*, (l) indicating a preference for the former of the opinions which is to be found in p. 12 of the Treatise De Jure Maris.

* 212 * *Mr. R. Palmer, Mr. Goldsmid, and Mr. Mellish*, for Mr. Lewis. — We submit that the neap-line best fulfils the definition of "ordinary" high-water mark, inasmuch as that line

(a) 5 Rep. 107 a.

(c) 5 M. & W. 327.

(b) 4 B. & C. 485; see p. 495.

(d) 3 B. & C. 91; S. C., 2 Bligh, N. S. 147.

(e) 5 B. & A. 268; see p. 292.

(i) 10 Price, 350.

(g) Anon., Dyer, 326 b.

(k) 10 Price, 378.

(h) 3 Dun. & Bell. 205.

(l) 6 Bell. Ap. Ca. 847.

would include land covered every day in the year by the sea. Lord HALE, defining the shore to be that space usually overflowed at ordinary tides, p. 26, excludes all spring-tides. On this principle PARKE, J., says, in the case of *Lowe v. Govett*, (a) “In the absence of proof to the contrary, the presumption as to such land (meaning land above the ordinary high-water mark) is in favour of the adjoining proprietor.” The only case in which the Crown was held to be entitled is *Attorney-General v. Parmeter*; (b) but that was the case of a nuisance, and there the parties were claiming under the Crown, and the decision was that the grant was bad.

If the right of conservancy is attributed to the Crown to the extent asserted by the information, the consequence will be directly repugnant to the doctrine laid down by Lord HALE, in p. 26 of the *Treatise De Jure Maris*, and would include lands which, by reason of their being uncovered for the greatest part of the year are dry and maniorable.

Mr. Roupell and *Mr. Dickinson* appeared for Messrs. Sims, Williams, & Co., lessees under Mr. Lewis.

Mr. James, in reply. — In *Lowe v. Govett* the Crown was not a party; and even granting the presumption in favour of the adjacent proprietors, still this will not deprive the Crown * of * 213 the right here asserted, nor dispense with the obligations of protecting the interests of the public for the purposes of navigation.

At the conclusion of the argument the learned Judges desired time to consider the question which had been submitted to them; and on the 8th July, 1854, Mr. Baron ALDERSON, on behalf of Mr. Justice MAULE and himself, delivered the following joint opinion:—

MY LORD CHANCELLOR, — In this case, on which your Lordship has requested the assistance of my brother MAULE and myself, I am now to deliver our joint opinion on the only question argued before us. That question, as I understand it, is this: What, in the absence of all evidence of particular usage, is the limit of the title of the Crown to the sea-shore? The Crown is clearly in such

(a) 3 B. & Ad. 863; see p. 871.

(b) 10 Price, 378.

a case, according to all the authorities, entitled to the *littus maris* as well as to the soil of the sea itself adjoining the coasts of England. What then, according to the authorities in our law, is the extent of this *littus maris*?

This, in the absence of any grant, or usage from which a grant may be presumed, is according to the civil law defined as the part of the shore bounded by the extreme limit to which the highest natural tides extend, “*Quatenus hybernus fluctus maximus excurrit*,” i. e., the highest natural tide; for according to Lord STAIR’S exposition, the definition does not include the highest actual tides, for these may be produced by peculiarities of wind or other temporary or accidental circumstances, concurring with the flow produced by the action of the sun and moon upon the ocean.

But this definition (even thus expounded by the
 • 214 *authorities) of the civil law is clearly not the rule of the common law of England.

Mr. Justice HOLROYD, no mean authority, in his very elaborate judgment in the case of *Blundell v. Catterall*, (a) mentions this as one of the instances in which the common law differs from the civil law, and says that it is clear that according to our law it is not the limit of the highest tides of the year, but the limit reached by the highest ordinary tides of the sea, which is the limit of the shore belonging *prima facie* to the Crown. What, then, are these “highest ordinary tides”? Now we know that in fact the tides of each day, nay, even each of the tides of each day, differ in some degree as to the limit which they reach. There are the spring-tides at the equinox, the highest of all. These clearly are excluded in terms by Lord HALE, both in p. 12 and in p. 26 of his *Treatise De Jure Maris*. For though in one sense these are ordinary, i. e. according to the usual order of nature, and not caused by accidents of the winds and the like, yet they do not ordinarily happen but only at two periods of the year. These, then, are not the tides contemplated by the common law, for they are not “ordinary tides,” not being “of common occurrence.” This may perhaps apply to the spring-tides of each month, exclusive of the equinoctial tides; and indeed, if the case were without distinct authority on this point, that is the conclusion at which we might have arrived. But then we have Lord HALE’S authority, p. 26, *De Jure*

(a) 5 B. & A. 268; see p. 290.

Maris, who says, "Ordinary tides or neap-tides which happen between the full and change of the moon" are the limit of "that which is properly called *littus maris*," and he excludes the spring-tides of the month, assigning as the reason that the "lands covered with these fluxes are for the most part of the year dry and maniorable," i. e., * not reached by the tides. And * 215 to the same effect is the case of *Lowe v. Govett*, (a) which excludes these monthly spring-tides also.

But we think that Lord HALE's reason may guide us to the proper limit. What are then the lands which for the most part of the year are reached and covered by the tides? The same reason that excludes the highest tides of the month (which happen at the springs) excludes the lowest high tides (which happen at the neaps), for the highest or spring-tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which we think may be best adopted. It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore therefore is about four days in every week, i. e., for the most part of the year, reached and covered by the tides. And as some not indeed perfectly accurate construction, but approximate, must be given to the words "highest ordinary tides" used by Mr. Justice HOLROYD, we think, after fully considering it, that this best fulfils the rules and the reasons for it given in our books.

We therefore beg to advise your Lordship that, in our opinion, the average of these medium tides in each quarter of a lunar revolution during the year gives the limit, in the absence of all usage, to the rights of the Crown on the sea-shore.

July 15.

THE LORD CHANCELLOR. — The question for decision is, what is the extent of the * right of the Crown to the sea- * 216 shore? Its right to the *littus maris* is not disputed. - But what is the *littus*? Is it so much as is covered by ordinary spring-tides, or is it something less?

(a) 3 B. & Ad. 868.

The rule of the civil law was, “*Est autem littus maris quatenus hybernus fluctus maximus excurrit.*” This is certainly not the doctrine of our law. All the authorities concur in the conclusion that the right is confined to what is covered by “ordinary” tides, whatever be the right interpretation of that word. By “hybernus fluctus maximus” is clearly meant extraordinary high tides, though, speaking with physical accuracy, the winter tide is not in general the highest.

Land covered only by these extraordinary tides is not what is meant by the sea-shore; such tides may be the result of wind, or other causes independent of what ordinarily regulates flux and reflux. Setting aside these accidental tides, the question is, What is the meaning of ordinary? It is evidently a word of doubtful import. In one sense, the highest equinoctial spring-tides are “ordinary;” i. e., they occur in the natural order of things. But this is evidently not the sense in which the word ordinary is used when designating the extent of the Crown’s right to the shore. *Treatise De Jure Maris*, pp. 12, 25.

Disregarding, then, extreme tides, we next come to the ordinary spring-tides, i. e., the spring-tides of each lunar month. No doubt, speaking scientifically, they probably all differ; but practically this may be disregarded. Lord HALE gives no absolutely decided opinion; but he evidently leans very strongly against the right to the land covered only by spring-tides (*Treatise De Jure Maris*, p. 26), and refers to decisions which support his views. Then he describes ordinary tides as if synonymous with neap-tides.

This leaves the question very much at large, and there is very little of modern authority. In *Blundell v. Catterall*, (a) Mr. Justice HOLROYD says, by the common law it, i. e., the shore, is confined to the flux and reflux of the sea at ordinary tides, meaning the land covered by such flux and reflux.

Still the question remains, What are ordinary tides? The nearest approach to direct authority is *Lowe v. Govett*. (b) There certain recesses on the coast, covered by the high water of ordinary spring-tides, but not by the medium tides between spring and neap tides, were held not to pass under an Act vesting in a company an arm of the sea daily overflowed by it. Lord TENTERDEN

(a) 5 B. & A. 268.

(b) 3 B. & Ad. 863,

held that these recesses were not ordinarily overflowed by the sea, which shows clearly that he did not consider the overflowing by ordinary spring-tides to be what is meant by ordinarily overflowing; and both Mr. Justice LITLEDALE and Mr. Justice (now Baron) PARKE concur in saying that the recesses in question were above ordinary high-water mark, clearly showing their opinion to be that what is meant by ordinary high-water mark is not so high as the limit of high water at ordinary spring-tides.

There is, in truth, no further authority to guide us; for the question did not arise in either of the cases of *Attorney-General v. Burridge*, (a) or *Attorney-General v. Parmeter*, (b) as to the buildings at Portsmouth.

In this state of things, we can only look to the principle * of the rule which gives the shore to the Crown. That * 218 principle I take to be that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. Lord HALE gives as his reason for thinking that lands only covered by the high spring-tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is, that the Crown's right is limited to land which is for the most part not dry or maniorable.

The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord HALE, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I therefore concur with the able opinion of the Judges, whose valuable assistance I had, in thinking that medium line must be treated as bounding the right of the Crown.

(a) 10 Price, 850.

(b) 10 Price, 878.

LEE v. LEE.

1853. June 2. Before the LORDS JUSTICES.

The conduct of an administration suit was taken from the plaintiff and given to a defendant. The Master afterwards was of opinion that the suit had been defective from the beginning for want of parties, and suspended the prosecution of the inquiries directed by the decree, to enable the defect to be supplied. *Held*, that a bill for that purpose filed by the defendant having the conduct of the suit without previous notice to the plaintiff was not irregular, so as to entitle the plaintiff to move to take it off the file, and a motion to that effect was refused with costs.²

THIS was an appeal from the refusal by Vice-Chancellor Wood of a motion to take off the file for irregularity a supplemental bill filed by a defendant. The original hearing is reported in the 10th volume of Mr. Hare's Reports, App., p. lxxii. The suit was one for the administration of a testator's estate, in which the usual decree had been made; but the plaintiff not having been diligent in prosecuting the decree, a defendant had applied for and had obtained the conduct of the suit. In proceeding under the reference directed by the decree, the Master was of opinion that the suit was and had been originally defective for want of parties, and postponed further proceedings to afford time for supplying the defect. The defendant, having the conduct of the suit, filed a supplemental bill without previously giving notice to the original plaintiff. The plaintiff thereupon made the motion under appeal to take this supplemental bill off the file.

Mr. Willcock and *Mr. Murray* supported the appeal

Mr. Rolt and *Mr. Speed* opposed it.

¹ S. C., 17 Jur. 607; 10 Hare, Ap. 72.

² See *Noble v. Stow*, 30 Beav. 512; 8 Jur. N. S. 147; *Stratford v. Baker*, L. R. 4 Eq. 256.

The following cases were referred to: *Dixon v. * Wyatt*, (a) * 220
Williams v. Chard, (b) *Phillips v. Clark*, (c) *Berrow v.*
Morris, (d) *Devaynes v. Morris*, (e) *Cattell v. Corrall*, (g) *Cot-*
tingham v. Earl of Shrewsbury, (h) *Ranger v. The Great Western*
Railway Company, (i) *Hodson v. Ball*. (k)

THE LORD JUSTICE KNIGHT BRUCE. — That three hours of the public time, which might have been employed in administering justice in some substantial case, should have been consumed by a litigation such as that which has engrossed our attention to-day, is matter of regret at least, and perhaps something more. The question — if question it should be called — is not whether the bill sought to be removed from the records of the Court is open or not open wholly or partially to a demurrer or plea. The question is not whether the bill is good or bad, proper or improper, likely to succeed or likely to fail; but the question is, whether the bill ought to be removed from the records of the Court for irregularity; and I have not heard throughout the discussion any thing approaching to a reason for such a course. It appears that a decree had been obtained in a certain suit in which a lady of the name of Lys, who is now living, was the surviving plaintiff. By an error or accident, though the decree was obtained, the suit was defective, and had been from the beginning defective, in parties; for certain interests which, in order to make the decree effectual, ought to have been represented in the cause, were not so represented. Accordingly, the Master in whose office the decree was, declared * that he could not for any useful purpose proceed. There- * 221 upon this bill was filed, not by the original plaintiff, but by one of the defendants, for the purpose of curing in some fashion the defect; and Miss Lys contends, that however necessary it may be to cure this defect, originally of her creation, — however impossible to cure it without some step of this description being taken, — it is her peculiar privilege to do it, and that any proceeding on the part of any other person for the purpose must necessarily fail, — a contention supported on her behalf by referring to the rules or

(a) 4 Madd. 392.

(b) 5 De G. & Sm. 9.

(c) 7 Sim. 231.

(d) 10 Beav. 437.

(k) 11 Sim. 456; S. C., on appeal, 1 Ph. 177.

(e) 1 M. & Cr. 213.

(g) 1 Hare, 216.

(h) 3 Hare, 627.

(i) 18 Sim. 368.

supposed rules or precedents as to bills of revivor and supplement. Now, the present is clearly not a bill of revivor, nor professes to be so; nor, according to my notions on the subject, is it a bill of supplement; for it is addressed to an interest which never at any moment was bound by the suit, or represented in the suit, or affected by the suit. It is therefore, to a certain extent at least, an original bill,—a bill in a new suit. And it has been filed by the person to whom the conduct of the decree has been committed and intrusted by reason of the default of the party now complaining. What the defendant has done, therefore, is only that without which the primary suit could not proceed; without which what he had undertaken to do could not be done. The motion is entirely untenable, and must be refused, with costs.

THE LORD JUSTICE TURNER. — This is a motion on the part of the original plaintiff to take off the file, upon the ground of irregularity, a bill which is called “a supplemental bill.” I take “irregularity” to be where there has been a violation of some settled

rule of the Court, as there undoubtedly was in *Hodson v. Ball*, (a) where the attempt was to file a * bill in the nature of a bill of review, under the colour of filing a supplemental bill. The only irregularity here complained of is, that what is called the supplemental bill has been filed without communicating with the original plaintiff on the record. The question is, whether it is irregular for a defendant to file a bill of this nature without communicating with the original plaintiff.

Two cases only were cited which can fairly be considered to have any bearing on the question; viz., *Dixon v. Wyatt* (b) and *Phillips v. Clark*. (c) In *Dixon v. Wyatt* a bill had been filed by a creditor to administer a testator's estate, and the usual decree had been made. The creditor plaintiff died, and it was moved to substitute as plaintiff another creditor who had proved, but it was held that the proper course was to move for leave to file a supplemental bill. The object there was to introduce an entirely new party on the record in the place of the original plaintiff, and the difficulty arose from the necessity of providing for the rights of the original plaintiff, who had an interest in the further prosecution of the original suit in respect of the costs which had been incurred;

(a) 11 Sim. 456; S. C. 1 Ph. 177.

(c) 7 Sim. 281.

(b) 4 Madd. 392.

but in this case the original plaintiff remains. *Dixon v. Wyatt*, therefore, is no authority for the proposition contended for upon the present motion; nor is the case of *Phillips v. Clark*. In that case it was not decided that the assignees of the insolvent could not go on with the suit, but only that they could not stop the original plaintiff from proceeding in it. The decision was not that the bill filed by the assignees could *brevi manu* be taken off the file on the ground of irregularity, but simply that the assignees, having filed the supplemental bill, were not entitled to restrain the proceedings of the original plaintiff.

* I do not desire by any means to give encouragement to * 223 bills filed, as it has been called, to snap the conduct of a cause immediately on the occurrence of an abatement, and I think it might well be a rule that a cause should not be prosecuted by any party other than the original plaintiff, except on notice given to such original plaintiff, and default in the prosecution on his part; but that is a matter not settled by any rule of the Court. I am aware of no rule or order requiring such notice; and, as the matter stands, I take it to be a question entirely for the discretion of the Court.

It is said that there are cases which decide that the defendant cannot proceed, except upon default being made on the part of the original plaintiff in the cause; but no case has been produced showing by what rule we are to measure the neglect of the original plaintiff, or what degree of neglect on his part is to entitle the defendant to file a supplemental bill; it must be a question for the discretion of the Court to determine what neglect is sufficient for the purpose, and how that neglect must be measured. In this case it is obvious that from the commencement of the suit the original plaintiff has not been desirous *bona fide* to prosecute the suit; and if she has a right to file a supplemental bill, I cannot see that this gives her a right to have the bill filed by the second plaintiff taken off the file; the effect of which would be to destroy the proceedings based upon it, which have progressed to a considerable extent, and to destroy them only for the purpose of commencing a new litigation.

If it shall appear at the hearing of this cause that the bill has been improperly filed, or that extra costs have been occasioned by it, and new defendants introduced on the record, it will be a question for the judgment of the Court whether the plaintiff is

* 224 to bear the costs, or * whether they are to fall on the estate of the testator in the cause. Such questions are for the hearing, and cannot now be decided. The question before us is not, in my opinion, one of irregularity, but one for the discretion of the Court, which discretion we shall best exercise by refusing this motion with costs.

COLLARD v. SAMPSON.

1853. June 8, 4. Before the LORDS JUSTICES.

It is not so settled that a power to appoint "by deed or deeds, writing or writings under hand and seal," can now be well exercised by an unsealed will, that a purchaser can be forced to take a title depending on that proposition.¹

THIS was an appeal from the decision of the Master of the Rolls, overruling exceptions to the Master's report, in favour of a title in a specific performance suit instituted by a vendor.

The subject of the contract was leasehold property, and the title was deduced under a settlement, whereby the property was assigned to trustees upon such trusts as Thomas West during his life by any deed or deeds, writing or writings, under his hand and seal, to be attested by two credible witnesses, should direct, limit, and appoint.

Thomas West made his will, dated the 17th February, 1849, executed as required by the Wills Act (7 Will. 4 & 1 Vict. c. 26),

¹ In *Smith v. Child*, W. N. (Dec. 17, 1870) 257, V. C. S., the Vice-Chancellor said that the question raised on the will, under which the plaintiff derived title to the property sold, was a difficult one of construction, and he did not intend to decide it, because it was the well-settled rule of the Court never to force a doubtful title on a purchaser. In *Richmond v. Gray*, 3 Allen, 27, CHAPMAN J., said: "A Court of Equity will not now compel a purchaser to accept a title which is so doubtful that it may expose him to litigation, though the Court may believe it to be good." See also, to same effect, *Sturtevant v. Jaques*, 14 Allen, 523; *Park v. Johnson*, 7 Allen, 383; *Pyrke v. Waddingham*, 10 Hare, 1; *Young v. Rathbone*, 1 C. E. Green (N. J.), 224; *Voorhees v. DeMeyer*, 3 Sandf. Ch. 614; 1 Sugden V. & P. (7th Am. ed.) [505], 576 *et seq.* and notes; 2 Dan. Ch. Pr. (4th Am. ed.) 989 and notes; Fry Spec. Perf. 253 *et seq.*; *Mullins v. Trinder*, L. R. 10 Eq. 449; Sugden V. & P. (14 Eng. ed.) 385, 386.

but not sealed. The question was, whether the power was well executed by the will.

The Master of the Rolls decided upon the authority of *Buckell v. Blenkhorn*, (a) intimating that, but for that decision, he should probably have held differently. The case is reported below by Mr. Beavan, Vol. XVI. p. 543.

* *Mr. Rolt* and *Mr. T. H. Terrell* were for the appellant, * 225 the purchaser.

Mr. Roupell and *Mr. Browell*, for the respondent, the vendor, contended that the decree was too favourable to the defendant, who ought to have been ordered to pay costs. This had not been done, because the report found that the title was only completed by the production in the Master's office of a receipt for the rent. The receipt, however, had never been asked for, or it would have been furnished, and the want of it had not occasioned the suit.

The following cases were cited: *Doe v. Holloway*, (b) *Kibbett v. Lee*, (c) *Countess of Roscommon v. Fowke*, (d) *Edwards v. Edwards*, (e) *Long v. Collier*, (g) *Holwood v. Bailey*. (h)

THE LORD JUSTICE TURNER. — If it was necessary to decide the important question that has been raised in this case as to the true construction of the Act of Parliament, I should require further time for consideration. The real question, however, is not what the true construction of the Act of Parliament is, but whether the title of the vendor to the subject-matter of the contract is such as a purchaser can be compelled by this Court to take. According to the common rule of the Court, this question must be answered in the negative, if there is a reasonable doubt upon the title,—if the law upon the question, on which the title depends, is not well settled. This case stands thus: There has been on one side the decision of Vice-Chancellor WIGRAM in * *Buckell v. Blenkhorn*, (a) by which, in the present case, the Master of the Rolls, in adjudicating on the question before him, has held him-

(a) 5 Hare, 131.

(b) 1 Stark. 431.

(c) Hob. 312.

(d) 6 Bro. P. C. 158.

(e) 3 Madd. 197; Jac. 335.

(g) 4 Russ. 269.

(h) 4 Russ. 271.

self to be bound, but at the same time he has intimated that, in the absence of that authority, his conclusion would have been different. When, therefore, the Court is called upon to enforce the specific performance of this agreement, it is, in truth, called on to force upon the purchaser a title which a judge of this Court has said, that, but for the authority of *Buckell v. Blenkhorn*, he would not have compelled a purchaser to take. In *Pyrke v. Waddingham* (a) I stated my opinion as to the rule by which the Court ought to be guided in measuring the doubts which may be entertained upon titles. What I said there was, that "if the doubts as to the title arise upon a question connected with the general law, the Court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in *Moody v. Walters* (b) and *Biscoe v. Perkins*, (c) and refusing to enforce it in the other, as in *Blosse v. Lord Clanmorris* (d) and *Sloper v. Fish*." (e) To that opinion I adhere. The question then is, whether there is a reasonable doubt upon the point of law in this case. That depends upon two points: first, upon the true construction of the Act of Parliament; and, secondly, upon the effect of the decision in *Buckell v. Blenkhorn*. With reference to the Act of Parliament, the question turns upon the tenth section, which enacts, "That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution

* 227 * and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in execution of such power should be executed with some additional or other form of execution or solemnity." The question is, what is the meaning of the words "power of appointment by will," contained in that section, — whether it embraces every case in which a power of appointment may be exercised by will, or applies only to cases in which the power is in terms given to be so exercised. The language of the act leaves this point in doubt. The interpretation clause, in defining what is meant by the word "will" when used in the act, says that that word shall extend to a testament and to

(a) 10 Hare, 1.

(d) 3 Bligh, 62.

(b) 16 Ves. 283, 312.

(e) 2 V. & B. 145.

(c) 1 V. & B. 485, 493.

a codicil, and to an appointment by will, or writing in the nature of a will, in exercise of a power ; so that, according to the interpretation clause of the act, a power of appointment by will extends to and includes a power of appointment by testament or codicil, or writing in the nature of a will, but the act goes no further. Every thing beyond this is left to judicial determination. In the case before us, the power is to be exercised “ by deed or deeds, writing or writings under hand and seal, to be attested by two credible witnesses ; ” and no doubt the words “ writing or writings ” will extend to authorize the power being exercised by note or memorandum or other document, including a will, or writing in the nature of a will, executed with the prescribed formalities. The power mentioned in the statute is therefore included within the power given by the instrument before us, but it does not seem to me to follow, that because the power mentioned in the statute is included in the power given by the instrument, the power given by the instrument is therefore a power to which the statute was intended to apply. It would be difficult, I think, to say that a power to appoint by will or other writing is the same thing as a power to * appoint by will or codicil, or writing in the * 228 nature of a will. If, therefore, the case stood upon the statute alone, I think that the purchaser could not be compelled to take this title. It was said, however, that the point was settled by decision, and great reliance was placed in the course of the argument, on the part of the vendor, upon the case of *Buckell v. Blenkhorn*, but I doubt whether a point of this nature can, for such a purpose as we have here to deal with, be considered to be settled by a single decision ; and at all events I think that the Court, before it could as against a purchaser hold the point to be settled by a single decision, must be satisfied that the decision rests upon grounds open to no doubt or question. In the case referred to, the learned Judge, after noticing the decisions upon the subject before the late statute, says, “ Before the Wills Act the word ‘ writing,’ in cases like the present, had received a judicial interpretation, which included a will. But the Court held that they could not dispense with the formalities prescribed by the instrument creating the power, although they were not necessary to the validity of the will, because the forms, being in themselves without value, could have no equivalent. Now, by the Statute of Wills, 7 Will. 4 & 1 Vict. c. 26, it is provided, that in the execution of wills, one given form

shall be observed, and that such form shall be equivalent to every arbitrary form of execution which the donor of a power may prescribe. It was not at the expense, but in favour and for the benefit of such donors, and in order that their intentions might not be disappointed by the neglect of useless forms, that this legislative provision was made. I must presume in this case that Sarah M'Lauchlan made the deed of the 1st September, 1843, with the knowledge of the decisions upon the word 'writings,' and with knowledge also of the provisions of the Wills Act." But it may

be asked why, if the provisions of the statute were intended
 * 229 to extend to all cases * in which powers of appointment can be exercised by will, this intention was not distinctly expressed; why the language used is, "power of appointment by will," and not "power of appointment exercisable by will;" and it may be said that, assuming the testatrix to have known that the general word "writing" authorized an appointment by will, and that a will executed according to the provisions of the statute would operate as an execution of a power to appoint by will, she could not have known what was a power to appoint by will within the meaning of the statute. I do not mean to give any opinion as to the correctness of the conclusion arrived at in the case of *Buckell v. Blenkhorn*, but I think it would be going too far to hold that the law upon this point can be considered to be finally settled by that case. To assume that a power to appoint by "any writing" is identical with a power to appoint by "will," is in truth to assume the whole question upon the construction of the Act of Parliament, — a question, it seems to me, open to very serious doubt.¹ My opinion, therefore, is that this is not a title which a purchaser ought to be compelled to take.

THE LORD JUSTICE KNIGHT BRUCE. — This case, perhaps, is very near the line, but I think it does just fall within the line which separates such cases as *Jervoise v. Duke of Northumberland* (a) and *Blosse v. Lord Clanmorris* (b) from those of specific performance. Though I have mentioned *Blosse v. Lord Clanmorris*, I am not of opinion that the present is a case for costs on either side, but there should be no action.

(a) 1 Jac. & W. 559.

(b) 3 Bligh, 62.

¹ See *West v. Ray, Kay*, 385; *Moss v. Harter*, 18 Jur. 973, 976.

* WATSON v. MARSTON.

* 230

1853. May 25. June 4. Before the LORDS JUSTICES.

A mortgagee, with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee, with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale; and on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, showing that the above-mentioned clause was inserted by inadvertence, and that she never intended to incur the risk of opening the foreclosure by conveying under the power. *Held*, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power.¹

THIS was the appeal of the defendant, a mortgagee, who had contracted to sell freehold property comprised in her security, and against whom Vice-Chancellor STUART had made a decree in a suit instituted by the purchaser, directing the specific performance of the contract, and also directing that the conveyance should be made by the defendant under a power of sale contained in the mortgage.

The question was whether the plaintiff was entitled to a conveyance in that form or must take the title under a decree for foreclosure, obtained under the following circumstances: —

The mortgage to the defendant was created by an indenture dated the 22d of May, 1847, made between Joseph Travis Clay of the first part, William Clay of the second part (who was a party merely for the purpose of joining in a covenant for payment of the mortgage money), and Ann Marston (the defendant) of the third part; and thereby Joseph Travis Clay granted, released, and confirmed the hereditaments in question, which consisted of freehold property at Birkenhead, unto and to the use of Ann Marston, her heirs and assigns, subject to a proviso for redemption on payment of 7000*l.* and interest on the 22d of November, 1847. And the deed contained a power of sale, either in the event of default * being made in payment of the principal sum of * 231 7000*l.*, on six months' notice being given requiring payment

¹ See *Morrison v. Barrow*, 1 De G., F. & J. 633, 638; *Barnard v. Cave*, 26 Beav. 253.

thereof as therein mentioned, or in the event of any half-yearly payment of interest for the sum of 7000*l.*, or for so much thereof as should remain due or owing, or any part of such interest being at any time thereafter in arrear and unpaid by the space of three calendar months next after the half-yearly day of payment upon which the same should become due.

A second mortgage was afterwards made by an indenture dated the 30th of September, 1847, between Joseph Travis Clay of the one part, and William Clay and William Lucas of the other part, whereby Joseph Travis Clay conveyed the premises to William Clay and William Lucas, their heirs and assigns (subject to the former mortgage), for securing the payment by Joseph Travis Clay to William Clay and William Lucas, or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, of the sum of 3,000*l.* with interest thereon. It appeared that this amount had been advanced by William Clay and William Lucas as co-executors and co-trustees with Joseph Travis Clay, under the will of one William Clay, deceased, out of trust moneys held by them upon trusts under which, in the events which had happened, William Lucas and Elizabeth his wife, in right of Elizabeth Lucas, Daniel Rutter and Hannah Maria his wife, in right of Hannah Maria Rutter, and Sarah Ann Clay, Amelia Clay, and Mary Clay, were the only persons beneficially entitled.

On the 5th of December, 1848, the defendant filed a foreclosure bill against the assignees of Joseph Travis Clay and of William Clay (who had both become bankrupt), and against William Clay,

William Lucas and Elizabeth his wife, Joseph Travis Clay,
 * 232 Daniel Rutter * and Hannah Maria his wife, Sarah Ann Clay, Amelia Clay, and Mary Clay.

The defendants William Clay, William Lucas and Elizabeth his wife, Daniel Rutter and Hannah Maria his wife, Sarah Ann Clay, Amelia Clay, and Mary Clay, by their answer to the said bill, respectively stated, amongst other things, that they and each of them did thereby renounce and disclaim any estate or interest whatsoever at law or in equity in the mortgaged premises, or any part thereof, or in any other matters or matter whatsoever in question in the said suit; and that they had by a deed-poll dated the 8th of May, 1849, disclaimed all right, title, interest, and estate whatsoever in the premises.

The deed-poll thus referred to was acknowledged by Elizabeth

Lucas and Hannah Maria Rutter according to the provisions of the act for abolishing fines and recoveries, and by it William Clay, William Lucas and Elizabeth his wife, Daniel Rutter and Hannah Maria his wife, Sarah Ann Clay, Amelia Clay, and Mary Clay, disclaimed all estate, right, title, interest, equity of redemption, claim, and demand whatsoever in or to the several pieces or parcels of land, hereditaments, and premises by the indenture of the 30th of September, 1847, expressed, or intended to be granted, released, and confirmed, and all powers, trusts, and provisions contained in the said indenture in relation thereto. It was further witnessed by this deed that William Clay, and William Lucas and Elizabeth his wife, Daniel Rutter and Hannah Maria his wife, Sarah Ann Clay, Amelia Clay, and Mary Clay, for the satisfaction of the defendant, or any other person or persons who were or might be interested in the same hereditaments, but not by way of acknowledgment or admission of their or any of their having accepted the

* conveyance or assurances expressed or intended to be * 233 made by the recited indenture, or of any estate, right, title, interest, equity of redemption, claim, or demand whatsoever, in, to, out of, or upon all or any of the hereditaments, and so far only as they lawfully could or might, but no further or otherwise, granted and released unto the defendant, her heirs and assigns, the mortgaged hereditaments freed and discharged of and from all right or equity of redemption, if any such could be assumed to have existed under the indenture of the 30th of September, 1847.

The foreclosure suit, with two supplemental suits occasioned by a sale of part of the property and a change of assignees, came on to be heard on the 23d of April, 1850, and a decree was made to the following effect: "Upon hearing the indenture of mortgage of the 22d of May, 1847, and the deed-poll of the 8th of May, 1849, read, and the defendants, William Clay, William Lucas and Elizabeth his wife, Daniel Rutter and Hannah Maria his wife, Sarah Ann Clay, Amelia Clay, and Mary Clay, by their answer, disclaiming all interest in the mortgaged premises at Birkenhead in the pleadings mentioned, and the defendants, Henry Philip Hope, John Brooke, Joseph Travis Clay, William Pennell, and John Whitwell, by their counsel consenting, it is ordered and decreed that the defendants shall stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption, of, in, and to the hereditaments comprised in the plaintiff's mortgage."

The agreement for sale was dated the 9th of December, 1850, and was made between Ann Marston, for herself, her heirs, executors, and administrators, of the one part, and the plaintiff James Otley Watson, for himself, his heirs, executors, and administrators, of the other part.

* 234 * It contained, among other stipulations, the following:

“That the said Ann Marston, being a mortgagee with power of sale, shall enter into no covenant for title, except the usual covenant against incumbrances.”

The abstracts were delivered shortly after the sale, and on the 27th of December, 1850, the plaintiff's objections to the abstracts were delivered; one of which was, that the defendant having contracted to sell as mortgagee, the power of sale should be set out.

On the 20th of January, 1851, Mr. Fisher, the defendant's solicitor, returned his answers to the objections, and thereby stated that the defendant sold not as mortgagee, but as absolutely entitled by virtue of the decree of foreclosure.

After some correspondence, Mr. Fisher, on the 26th of April, 1851, sent to the plaintiff a letter of that date, wherein he suggested that the power of sale which the defendant enjoyed by her mortgage ceased when the decree of foreclosure was made, and that she could not be advised to convey to the plaintiff in the character of mortgagee; but he offered that she should enter into the ordinary covenants for title as owner, instead of the mere covenant that as mortgagee she had not incumbered, as prescribed by the contract.

In reply to the last-mentioned letter, the plaintiff, on the 29th of April, 1851, wrote to Mr. Fisher as follows: “I am not sure whether I knew of the foreclosure suit before the contract was signed. I think not; but, supposing I did, it is manifest that both buyer and seller preferred an exercise of the power of sale to a title under the suit, and that preference I have always retained, and still do retain. Whether the decree in that suit de-

* 235 stroyed * the power of sale is a matter for my consideration rather than the vendor's, and I am advised it does not. I am further advised that the foreclosure suit is defective.”

The prayer of the bill in the present suit was, that the defendant might be decreed specifically to perform the agreement, and under and by virtue and in exercise of the power of sale so contained in

the mortgage-deed of the 22d of May, 1847, as aforesaid, to convey, and assure the said hereditaments and premises to the plaintiff, or, as he should direct, pursuant to the terms of the agreement.

On behalf of the defendant, her solicitor, Mr. Fisher, deposed that the clause relied upon in the agreement as to the defendant being a mortgagee with power of sale was inadvertently introduced, having been copied from a former contract for sale of another part of the property entered into before the foreclosure decree was made; and that, although the several other clauses and stipulations in the contract had been the subject of much discussion before the same was finally settled, yet no discussion whatever took place relating to that clause, nor had the same been in any manner adverted to by either party in the course of the discussion which took place relative to the other terms of the contract; and that the defendant and her solicitor fully supposed and believed that the defendant was selling the estate as the absolute owner thereof, and without any liability to account for the proceeds of such sale to any one.

By the decree under appeal it was declared that the plaintiff was entitled to a specific performance of the contract or agreement dated the 9th of December, 1850, on the footing that the defendant thereby contracted or * agreed with plaintiff to * 236 sell the hereditaments and premises comprised in the said contract or agreement, as mortgagee with power of sale; and it was ordered that the defendant, Ann Marston, should, under and by virtue and in exercise of the power of sale contained in the mortgage deed of the 22d of May, 1847, convey and assure the hereditaments and premises comprised in the said contract or agreement to the plaintiff, or as he should direct, and do and execute all necessary acts and deeds for that purpose.

Mr. Rolt, Mr. Follett, and Mr. Bazalgette, for the plaintiff. — The agreement was expressly entered into by the defendant in the character of mortgagee with power of sale, and the plaintiff is entitled to have it specifically performed by the defendant in that character. The defendant has instituted no suit to reform the agreement, nor has she any case for such relief. There would be an end of the relief by way of specific performance if it were a sufficient defence to say that the defendant did not contemplate all the consequences of the contract.

[THE LORD JUSTICE KNIGHT BRUCE. — Although at law “*ignorantia juris non juvat*,” the maxim is not universally applicable in equity. I doubt whether the plaintiff is not preferring a bad to a good title.]

The foreclosure decree gives no time for redemption, but proceeds upon a deed of disclaimer executed by two trustees and two married women. Six months had not elapsed from the time of the decree when the sale was made.

[THE LORD JUSTICE KNIGHT BRUCE. — Were they not co-defendants with their husbands in the foreclosure suit; and, if so, could they afterwards set aside the decree? His Lordship referred to *Turner v. Turner*. (a)]

* 287 If the title is too doubtful, under the foreclosure * decree, to be forced on a purchaser, he is entitled under the contract to have it made under the power of sale. This is no hardship on the vendor. She obtained an irregular decree for foreclosure, and in less than six months afterwards sold for a sum three times as great as the amount due to her for principal and interest on her debt. The agreement for sale itself, being binding in equity, has the same effect (if any) in opening the foreclosure as a conveyance would have; and the decree for specific performance has not, therefore, deteriorated her position. The plaintiff is at all events entitled to a specific performance and to a good title; and, if that title cannot be made under the foreclosure decree, the defendant must make it otherwise, having the power to do so.

They referred to *Forster v. Hoggart*. (b)

Mr. Malins and *Mr. C. Barber*, for the appellant. — The remedy by way of specific performance is discretionary, and will not be granted if the contract has been entered into under a mistake. *Lord Townshend v. Stangroom*. (c) And it is not necessary for the defendant to institute any cross suit to rescind or reform the agreement.

(a) 2 De G., M. & G. 28. (b) 15 Q. B. 155. (c) 6 Ves. 328.

Mr. Rolt, in reply. — It is true that the relief by way of specific performance is discretionary, but the discretion is not arbitrary. It is regulated by defined rules and principles.

THE LORD JUSTICE TURNER. — The plaintiff has filed this bill to enforce the specific performance of an agreement entered into under these circumstances: The defendant was originally a mortgagee * of the estate, and had obtained in 1850 a * 288 decree for foreclosure. Whether the equity of redemption was regularly or completely foreclosed may be open to question. It may be that the title under the decree could not be enforced upon a purchaser.¹

The contract for purchase, however, contained this clause: "The vendor being a mortgagee with power of sale will only enter into the usual covenant that she has not incumbered." That, no doubt, imported that the defendant did contract, in the character of mortgagee with a power of sale. The question which we have to consider is, whether the agreement containing these words is to be enforced against her by directing a conveyance under the power. It is clear, if the evidence is correct, that the agreement was entered into by the defendant under the impression that the surplus after payment of her debt was to be her property, for which she was to be under no liability to account. And I do not see that there is any evidence to displace that view, or to show that *Mr. Fisher* was in any way aware that the effect of the insertion in the contract of the clause in question would place the defendant in the position of being liable to account to the parties interested in the equity of redemption for the surplus.

Now relief by way of specific performance is always within the discretion of the Court. This discretion is of course to be exercised carefully.² Specific performance is not to be withheld merely upon a vague idea as to the true effect of the contract not having been known. But, upon the evidence in this case, I think that, although there may have been an intention to complete under the mortgage title, there was no impression on *Mr. Fisher's* part that the effect would be to convert the defendant into a trustee of the surplus for the mortgagors. He * may have intended * 289

¹ See *Collard v. Sampson*, *ante*, 224 and n. (1).

² See 1 *Sngden V. & P.* (7th Am. ed.) [235], 274 and cases in note (2).

that the purchase should be completed under the power; but it clearly was not his intention to deprive the defendant of the benefit of the foreclosure. The rules upon which the Court acts will appear from two or three cases. In *Costigan v. Hastler*, (a) Lord REDESDALE said, "When a person undertakes to do a thing which he can himself do, or has the means of making others do, the Court compels him to do it or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so. Hastler had a contract with Parker, which he could have carried into execution, provided he could either have got the consent of the mortgagee to the lease, contracted for by Parker, or the claim of the mortgagee could have been satisfied by payment of a mortgage debt. If a mortgagor contracts to make a lease, the tenant has a right to say, 'You shall either obtain the consent of the mortgagee or redeem the mortgage; or if you complain of the hardship of this, you shall rescind the contract.' A Court of Equity may not compel the mortgagor, if highly inconvenient, to pay off the mortgage for the purpose of giving effect to the contract; but then he shall not enforce it against the tenant, if the tenant does not wish to abide by it. If the tenant will not give up the contract, the Court might say that it should not be specifically enforced against the landlord under such circumstances, and leave the tenant to seek his compensation in damages at law."

Wedgwood v. Adams (b) was as strong a case as could be. There Lord LANGDALE said, "I conceive the doctrine of the Court to be this, that the Court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more

or less reasonable, is not a thing that you can define: it
 * 240 * must depend on the circumstances of each particular case.

The Court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in

(a) 2 Sch. & Lef. 166.

(b) 6 Beav. 605.

a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages.”

If we acceded to the respondent's argument, we should, I think, be deviating from the principles on which the Court has acted in these cases. . The Court does not refuse a specific performance on the arbitrary discretion of the Judge. It must be satisfied that the agreement would not have been entered into if its true effect had been understood.

It was insisted that the foreclosure was as much opened by the agreement to sell under the power as it would be by a conveyance. I am by no means satisfied that this was the case. I do not think that by reason of the inadvertent introduction of the clause relied upon, it would be competent to the mortgagors to insist that the foreclosure was opened. To dispose of that question, it would be necessary to see under what circumstances that stipulation found its way into the agreement. Now, it appears upon the evidence that the clause was copied from the draft of another contract which had been prepared before the decree for foreclosure had been made, and that, being thus transcribed from one draft into the other, it was overlooked and allowed to remain, although the vendor had between the preparation of the two acquired

* the absolute fee. It is stated in the evidence that no discussion took place till after the engrossment of the agreement; and that at the time of the preparation of the draft, the defendant believed that she was the absolute owner of the property, and was prepared to sell, and intended to sell, as the absolute owner, having obtained the decree with that object. It appears that she did not consider that she was any longer liable to account. Under these circumstances, I think we should not be justified in depriving her of the benefit of any right she may have against the mortgagors. * 241

Our refusal to direct a specific performance is not the exercise of an arbitrary discretion; but being satisfied that the circumstances of the case bring it within the rule to be deduced from former decisions, we think that the bill must be dismissed, unless the plaintiff will accept the conveyance which the defendant is ready to execute.

The Lord Justice KNIGHT BRUCE concurred.

June 4.

The case stood over for the plaintiff to consider whether he would take the title under the foreclosure, and it is believed that ultimately terms were arranged for the completion.

1853. June 7. Before the LORDS JUSTICES.

By an agreement between bankers, a customer, and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, and simultaneously with it a second agreement was entered into between the bankers, the customer, and surety that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of attorney, and the customer became bankrupt: *Held*, —

1. That the agreement to issue execution was not *nudum pactum*.
2. That by the omission to file the warrant of attorney the surety was discharged.²
3. That the surety who had pleaded to an action on the guarantee, and then filed a bill for an injunction, had put the bank to unnecessary costs, and could only be relieved in equity on paying the costs at law subsequent to the declaration.

THIS was an appeal from a decision of Vice-Chancellor STUART, restraining proceedings at law upon a guarantee given by the plaintiff on the 14th February, 1850, to the Craven Bank, to secure all sums then due or which might become due from the plaintiff's son to the bank, to the extent of 1000*l.*, provided that if the plaintiff should give notice in writing to the Craven Bank determining the guarantee, he should be liable only to the extent aforesaid for the amount due from John Watson, the son, to the Craven Bank at

¹ S. C., 17 Jur. 568; 22 L. J. Ch. 858.

² See *Parker v. Watson*, 8 Exch. 404; 22 L. J. Exch. 167; *Chitty Contr.* (10th Am. ed.) 577 and note (y); 1 Story Eq. Jur. § 325; *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J. Ex. 229; affirmed, 7 H. & N. 353; 7 Jur. N. S. 945; *Strange v. Fooks*, 9 Jur. N. S. 943; 8 L. T., N. S. 789; 4 Giff. 408; *Burge, Suretyship* (1st Am. ed.), 115, 116.

the time of giving such notice, but not for any money advanced or liability incurred by the Craven Bank subsequent to the date of such notice.

The question was as to the effect upon this guarantee of a subsequent transaction in March, 1851, when the balance due on the guarantee amounted to 1000*l*. In that month the bank advanced to the son 300*l*., in addition to the 1000*l*. upon his warrant of attorney, dated the 19th of March, 1851, to confess judgment for 2600*l*., subject to a defeasance on payment of the floating balance of his account not exceeding 1800*l*., and a proviso that the guarantee given by the plaintiff should not in any manner * 243 be prejudiced or affected by the warrant of attorney.

Contemporaneously with the warrant of attorney, the father, the son, and the bank signed an agreement, whereby, after reciting that the son had executed the warrant of attorney with his father's sanction, it was agreed and declared that the memorandum of the 14th of February, 1850, should not be in any manner prejudiced or affected by the execution of the warrant of attorney, or by any judgment to be entered up and execution issued thereon, and that all moneys recovered under the warrant of attorney should be first applied in reduction of the balance of the banking account of the son remaining due at the time of levying such execution, before the memorandum of the 14th of February should be capable of being performed or satisfied by the plaintiff, either wholly or in part, to the end and intent that the father's guarantee should remain effectual to the extent of 1000*l*., after judgment should have been entered up on the warrant of attorney and execution levied in pursuance thereof, and the proceeds of such execution placed to the credit of the son's account. And it was lastly declared and agreed, that for the privilege or protection of the plaintiff (in addition to the proviso contained in the memorandum of the 14th of February for discharging him from continuing his responsibility on his giving notice to the bank of his desire to be so discharged), the bank should, on being required so to do in writing by the plaintiff (although such requisition should in no wise be necessary as between the bank and the son), enter up judgment on the warrant of attorney, and levy execution thereon against the goods and chattels of the son, as soon as practicable, and apply the proceeds of such execution in reduction of the balance of the son's account.

* 244 * The warrant of attorney was not filed according to the provisions of the 136th section of the Bankrupt Law Consolidation Act, 1849.

On the 24th of March, 1851, judgment was entered up upon it.

On the 25th of August, 1851, the plaintiff, by notice in writing, required the bank to levy execution. Execution was accordingly levied, and goods sold under it to the amount of the debt due from the son to the bank.

Shortly afterwards the son became bankrupt, and his assignees recovered back from the bank the amount levied under the execution, by reason of the omission to file the warrant of attorney, or a copy of it, according to the provisions of the Act. The bank then proved under the bankruptcy, and having received two dividends of 7s. 6d. and 8d. in the pound on their debt, they brought an action against the plaintiff on the guarantee.

The plaintiff pleaded several pleas, and afterwards filed the present bill for the delivery up of the memorandum, and an injunction to restrain further proceedings at law upon it.

The Vice-Chancellor made a decree accordingly, with costs. (a)

The defendants appealed from the whole decree.

Mr. J. Baily and *Mr. W. A. Collins*, for the plaintiff. —

* 245 It was the duty of the bank, as between them and the * plaintiff, to file the warrant of attorney; and as the loss has been occasioned by their neglect to do so, they cannot call upon the plaintiff to make it good. It is well settled, that any conduct of the creditor which may prejudice the surety, discharges him.

They cited *Acraman v. Hernaman*, (b) *Capel v. Butler*, (c) *Straton v. Bastall*, (d) *Bonser v. Cox*. (e)

Mr. Malins and *Mr. H. Nichols*, for the appellants. — The original guarantee was wholly independent of the agreement of 1851, and cannot be affected by it. As between the plaintiff and the bank, the latter agreement was a mere *nudum pactum*; and

(a) His Honor's judgment will be found reported in the first volume of Messrs. Smale & Giffard's Reports, p. 319.

(b) 15 Jur. 1008.

(d) 2 T. R. 366.

(c) 2 Sim. & St. 457.

(e) 6 Beav. 110.

moreover it provided that the original guarantee should not be prejudiced or affected by the warrant of attorney.

The Lord Justice KNIGHT BRUCE referred to *Dryden v. Frost.* (a)

Mr. Baily was only called on to reply on the question of costs.

THE LORD JUSTICE TURNER. — This case appears to me to be free from any reasonable doubt. The transaction in question seems to have been this: There was a guarantee given by the plaintiff in February, 1850, to the Craven Bank for the amount which might from time to time be due to the bank on their account current with the plaintiff's son, to the extent of 1000*l.* In the month of March, 1851, the son required a further credit from the bank to the extent * of 800*l.*, and it was agreed * 246 that further credit to that extent should be given by the bank to the son, upon the terms of the son giving to the bank a warrant of attorney to secure the whole 1300*l.* What the effect of that would have been if the transaction had rested on the warrant of attorney it is not necessary for us to decide; for, besides the warrant of attorney, there was a document connected with it, by which the father became a party to the latter transaction with the bank. This document was an agreement between the father and son and the bank, stipulating that, for the privilege and protection of the father, in addition to the proviso contained in the original guarantee or memorandum of February, 1850, for discharging him from continuing responsibility, on his giving notice to the bank of his desire to be so discharged, the bank should, on being required in writing by the father to do so, enter up judgment on the warrant of attorney, and levy execution thereon against the goods and chattels of the son as soon as practicable, and apply the proceeds of such execution in reduction of the balance of the banking account. There is a distinct undertaking, therefore, by the bank, contained in the memorandum of the 19th of March, 1851, that they will, upon the requisition of the father, immediately levy execution against the son in respect of the 1300*l.* secured by the warrant of attorney. Assuming that undertaking

to be founded on a sufficient consideration, it placed the bank in this situation, — that they were bound to issue execution upon the application of the father; and the obligation, therefore, was upon the bank to place themselves in a position to issue the execution. For this purpose it was necessary for them to file the warrant of attorney within twenty-one days, as required by the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106, § 136); but this they

failed to do, and the consequence is, that the agreement.
 * 247 they entered into with the plaintiff could * not be carried into effect, and the security given to them by the warrant of attorney has been lost. It has been contended, however, that there was no sufficient consideration for the agreement of the 19th of March, 1851; but that agreement was connected with the warrant of attorney of the same date, which again was connected with the further loan; and, taking the three instruments together, I think there was sufficient consideration for the agreement. It was observed, also, that there is an express provision in the agreement that the original guarantee should not be in any manner prejudiced or affected by the execution of the warrant of attorney; and it was argued that this saved whole, under all circumstances, the rights of the bank on the original guarantee. But the agreement only provides that the guarantee shall not be prejudiced or affected by the execution of the warrant of attorney, or by judgment to be entered up upon it; and the observation, therefore, does not remove the argument on the plaintiff's behalf, that the guarantee is affected by the neglect on the part of the bank in making effectual their security.

I think, therefore, that this decree is right; and the only remaining question is as to the costs below and those of the appeal. Now the plaintiff in equity, it appears, thought, in the first instance, that he had a good defence at law, and pleaded several pleas in an action brought by the bank upon the original guarantee to recover the 1000*l*. He allowed the action to go on until the record was completed, and then, and not till then, he filed this bill for relief against the guarantee. I concur in *Mr. Malins's* argument, that where a party defends an action at law, and afterwards resorts with success

to a Court of Equity, it is the habit of the Court not to
 * 248 saddle his opponent with the costs both at law * and in equity, but only with the costs of one proceeding. The plaintiff was entitled to have the question fairly tried, and to have the costs

of one trial of it, but of one only. The effect of his proceedings in this case has been, that he has put the defendants to the expense of a double litigation. The defendants have failed in equity, and the Vice-Chancellor was therefore right in giving the costs in equity against them. But it was the duty of the plaintiff to have elected at an earlier stage of the action at law to what proceeding he would resort. He should not have pleaded, and put the defendants in equity to a further expense at law. My opinion is, that the right mode of dealing with the costs at law will be to direct that the plaintiff in equity should pay the costs at law subsequent to the declaration; and with respect to the costs of the appeal, I think that the plaintiff in equity should have the deposit only.

THE LORD JUSTICE KNIGHT BRUCE. — The warrant of attorney and the agreement of March, 1851, formed essentially one transaction, and the agreement therefore cannot be considered as otherwise than for valuable consideration as between the surety and the bankers, because under the former agreement, that of February, 1850, the surety had power to give notice to determine his liability for any advance or debt that might be incurred after that notice. The transaction of March, 1851, was calculated, and probably intended, materially to influence and guide his discretion as to giving or abstaining from giving such a notice. The agreement of March was therefore a binding agreement in every sense between the bank and the surety. So viewing the case, I think it impossible to come to any other conclusion upon the transaction of March than this, viz., that, as between the surety and the bankers, it became the * duty of the latter, not merely by implied but by ex- * 249 press contract, to give the surety power to make the warrant of attorney an available and effectual instrument, which they abstained from doing. I entirely agree with what has been said.

BOUTTS v. ELLIS.

1853. June 8. Before the LORDS JUSTICES.

A testator, four days before his death, said to his wife: "I am a dying man; you will want money before my affairs are wound up." On the following day he gave his wife a crossed check, and on the next day but one, remembering that the check was crossed, he asked a friend who visited him to take it, and give the wife another for it, which the friend did, but his check was post-dated. The testator's check was paid before the testator's death to his friend, who, after that event, gave to the widow a check, not post-dated for the other. *Held*, that the transaction constituted a good *donatio mortis causæ*.¹

THIS was an appeal from the decision of the Master of the Rolls, reported in the seventeenth volume of Mr. Beavan's Reports, p. 121, where the facts are fully stated. The following is a short outline of them: On the 29th of February, Thomas Ellis, the testator in the cause, told his wife that he was dying, and that she would require money before his affairs were wound up. On the following day, he signed and delivered to her a check upon his bankers for 1000*l*. On the 4th of March, remembering that the check was crossed, he asked a friend named Billiter, who called upon him, to give his wife another uncrossed check upon the bankers of the latter in exchange for the crossed check. Mr. Billiter

¹ See *Witt v. Amis*, 1 B. & S. 109; *Amis v. Witt*, 33 Beav. 619. But the delivery of the donor's check on his banker, which was not presented before the donor's death, was held not a good *donatio mortis causæ*. *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Second National Bank v. Williams*, 13 Mich. 282; *Harris v. Clark*, 3 Comst. 93, 110, 121; *McKenzie v. Downing*, 25 Geo. 669. The donor's own promissory note, payable to the donee, cannot be the subject of a *donatio causæ mortis*. *Parish v. Stone*, 14 Pick. 198; *Smith v. Kittridge*, 21 Vt. 238; *Holley v. Adams*, 16 Vt. 206; *Raymond v. Sillick*, 10 Conn. 489; *Flint v. Pattee*, 33 N. H. 520; *Copp v. Sawyer*, 6 N. H. 523. But the promissory note of a stranger, whether payable to bearer or to order, may be given *causæ mortis* by delivery of the instrument itself with or without indorsement. *Caldwell v. Renfrew*, 33 Vt. 213; *Grover v. Grover*, 24 Pick. 261; *Bates v. Kempton*, 7 Gray, 382; *Sessions v. Moseley*, 4 Cush. 87; *Borneman v. Sidlinger*, 15 Maine, 429; *Brown v. Brown*, 18 Conn. 410; *Jones v. Dyer*, 16 Ala. 221; *Coutant v. Schuyler*, 1 Paige, 316; *Craig v. Craig*, 3 Barb. Ch. 78, 117, 118; *Chase v. Redding*, 13 Gray, 418; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Gourley v. Linsenbigler*, 51 Penn. St. 345. See also *Waring v. Edmunds*, 11 Met. 424.

did so, but his check was post-dated. The testator died on the 4th of March; but before his death, Mr. Billiter had received the proceeds of the testator's check. On a subsequent day he received back his post-dated check, and gave the widow one not post-dated, which was duly honoured. The Master of the Rolls had held that the gift was valid, independently of the question whether it was a good *donatio mortis causâ*. The residuary legatee appealed.

* *Mr. W. R. Ellis*, in support of the appeal. — This was * 250 not a good gift *inter vivos*, for the subject of the gift was the post-dated check, which was mere waste paper. The testator might have recovered back the proceeds of his own check, but his wife of course could not; nor was there any thing like a settlement of it to her separate use. Indeed, it is clear that there was no intention to make a gift if the testator had recovered. The objection as to the worthlessness of the paper, which was the only article given to the wife, is fatal to it as a *donatio mortis causâ*.

Mr. Lloyd and *Mr. Hislop Clark*, for the widow, and *Mr. W. W. Cooper*, for the executors, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — The circumstances in which this gift differs from an ordinary and unquestionable donation *mortis causâ* are accidental merely, not essential or substantial. It appears to me as plain and good a *donatio mortis causâ* as I have ever seen or heard of.

THE LORD JUSTICE TURNER. — I also feel no doubt upon this case. I think that the gift of the original check was never revoked, and that it constituted a good *donatio mortis causâ*.

1853. November 21. Before the Lord Chancellor Lord CRANWORTH, and the LORDS JUSTICES.

An estate was mortgaged in 1841 for 2000*l.*, with interest at 5*l.* per cent. In 1842 the mortgagor died, and in the same year the devisees of the equity of redemption sold by auction the mortgaged premises, together with other lands of the mortgagor's for 2700*l.*, to the mortgagee. The usual deposit

was paid at the time of the sale, and by the conditions of sale 4*l.* per cent was payable on the balance of the purchase-money. The mortgagee entered into possession in 1842, and remained in such possession until her death in 1847, when her devisees entered into possession. Upon a claim filed by the devisees of the mortgagor against the devisees and executors of the mortgagee for specific performance of the contract to purchase, eleven years after the sale, no demand having been made during that period either for the payment of the residue of the purchase-money into Court, or for interest on the mortgage. *Held*, under the circumstances, that a set-off *pro tanto* was to be inferred at the date when possession was taken by the mortgagee, and that, from that period, interest at 4*l.* per cent only was payable upon the balance of the purchase-money.]

THIS was a motion on behalf of the plaintiffs Anne Julia Wallis and Thurston Collins, by way of appeal from a decree made by the Vice-Chancellor STUART upon a claim on the 24th June, 1853. The following are the facts out of which the question argued on this appeal arose. The claim was filed by the plaintiffs as devisees of the vendor, John Wallis, for the purpose of enforcing the specific performance of a contract to purchase made in September, 1842.

The vendor's estate had been mortgaged in February, 1841, to a trustee for Louisa Sarel, the defendants' testatrix, to secure a sum of 2000*l.* with interest thereon at the rate of 5*l.* per cent. That sum of 2000*l.* formed part of the separate estate of Louisa Sarel. J. Wallis died in April, 1842, and shortly after his death his freehold and leasehold estates were put up for sale, and, on the 9th September, 1842, were bought by the defendant G. Bastard, as the agent for and trustee of Louisa Sarel. The total purchase-money for such estates amounted to 2700*l.*, upon which a deposit of 10*l.* per cent was paid by him, amounting to 270*l.*, and leaving a balance of 2430*l.* due in respect of the purchase-money.

* 252 * On the 21st of December, 1842, Louisa Sarel entered into possession of the purchased property, pursuant to certain conditions of sale, which provided for the payment of interest at 4*l.* per cent per annum from that day in the event of the balance of the purchase-money not being paid. At the time of the sale and possession being taken, the mortgage-deeds for 2000*l.* were delivered over by Louisa Sarel to a gentleman who was then acting as the common solicitor of herself and also on behalf of the plaintiffs, in part payment of the purchase-money. L. Sarel died in 1847, having devised all her estates to the defendants, whom she

also appointed executors. In 1849, H. R. Sarel, one of the executors of L. Sarel, and in whose name the mortgaged securities were taken, acknowledged the 2000*l.* to be the money of L. Sarel, and assigned to the defendants, her executors, the securities on which the mortgages were effected. The claim submitted, that after deducting the mortgage debt from the purchase-money there remained 430*l.*, with interest at 4*l.* per cent payable thereon from the 21st December, 1842, according to the conditions of sale. The claim also sought a reconveyance of the mortgaged estates.

It appeared that no interest had been paid either to L. Sarel or to the defendants in respect of the mortgage since 1842, and no interest upon the residue of the purchase-money had ever been claimed by the plaintiffs. The delay in completing the purchase was attributable to the loss of the title-deeds.

When the claim came on to be heard before the Vice-Chancellor STUART on the 24th June, 1853, he declared the plaintiffs entitled to specific performance, directing the usual inquiries as to title, and an account of what was due to the plaintiffs in respect of the purchase-money, * with interest at the rate of 4*l.* per * 253 cent from the 21st December, 1842, the day when the defendants' testatrix entered into possession, and also an account of what was due to the defendants for principal and interest at the rate of 5*l.* per cent per annum on the mortgage from the 9th February, 1841, the date of the mortgage, to the day when the amount should be certified; and upon payment of what should be found due from either party on the footing of the above declaration, the premises were directed to be conveyed by the plaintiffs to the defendants.

The plaintiffs now appealed from the whole of that decree, except so far as it directed a specific performance.

Mr. Malins and *Mr. Moxon*, for the plaintiffs, in support of the appeal. — The decree is clearly wrong in directing any reference as to title and in charging the plaintiffs with interest on the mortgage money after the period when the defendants' testatrix entered into possession. *Fludyer v. Cocker*. (a) In the case of *Birch v. Joy*, (b) Lord ST. LEONARDS sums up the law with reference to the present question thus: "From the time at which the purchaser was

(a) 12 Ves. 25.

(b) 3 H. L. Cas. 565; see p. 590.

to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money, not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of

* 254 Equity, as a general rule, considers this to follow: * the parties change characters, the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a Court of Equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate."

Mr. W. M. James and *Mr. Bird*, for the defendants, in support of the Vice-Chancellor's decree. — Here the entry into possession constituted no acceptance of the title, because it was before the day on which the title was to be shown; and it may be presumed that in this case it was a qualified possession entered into with the concurrence of the vendor: (a) in fact, the possession was taken *alio intuitu*, and a good title might not be shown. The doctrine of set-off is clearly not available in the present case. The two transactions, namely, the mortgage and the sale, were totally distinct: it so happens that part of the mortgaged premises was the same as the part sold, but some portions of the property sold did not form part of the mortgaged premises; and the mere accidental circumstance of the identity of some of the property mortgaged and sold cannot alter the rules applicable in this Court to the doctrine of set-off. That doctrine cannot be applied before there is an adjustment of accounts, because interest is to be calculated between the parties, and until that adjustment takes place the debts may be separately assigned, and a Court of Equity cannot, under such circumstances, regard the debts as extinguished. *Pettat v. Ellis*, (b) *Archdeacon v. Bowes*. (c) The doctrine of merger, being wholly dependent on intention, is also inapplicable; for it cannot here be presumed that the defendants' testa-

* 255 trix would, * under the circumstances, have so contracted against her interest.

(a) 1 Sugd. V. & P. 13, ed. 10.

(c) 3 Anst. 753.

(b) 9 Ves. 563.

The Lord Chancellor (without calling for a reply) said: This case arises under circumstances which certainly leave no doubt in my mind as to what is the reasonable determination to be come to. The only question is, whether that is the legal determination.

In September, 1842, Louisa Sarel, being the mortgagee of certain property for securing 2000*l.* and interest at 5*l.* per cent, the defendant Bastard, as trustee for her, entered into a contract with the devisees of the mortgagor to purchase the property so mortgaged for 2700*l.* It is said that the mortgage did not include all the property sold; but it does not appear to me that that circumstance makes any sort of difference. Louisa Sarel was let into possession; a deposit of 300*l.* was paid, leaving a balance of 430*l.* more to be paid, subject to a settlement of any arrears of interest that might exist. The terms of the conditions of sale were, that interest at 4*l.* per cent was to be paid on the residue of the purchase-money; but the purchase was virtually completed by the entry into possession and the payment of the deposit; and it is also to be observed, that about five-sixths of the purchase-money were retained in the hands of the mortgagee. Nothing was done about the balance. Louisa Sarel remained in possession from 1842 down to the period of her death in 1847; and ever since that period the defendants, as her devisees, have, up to the year 1853, continued in possession. The cause of the non-completion of the purchase, as I collect, is in point of fact attributable to the loss of some of the title-deeds. The delay thus arising was not occasioned by the fault of the purchaser, but of the vendor.

The purchaser, * however, agrees that it is to be treated as * 256 if completed. Under such circumstances, the reasonable thing would be to set off one debt against the other from the time when possession was taken. The purchaser would have been bound, if the vendors had pressed it, to have paid into Court the 2430*l.*, the balance of the purchase-money, as a condition for being allowed to retain possession. That was not pressed. On the other hand, no request was ever afterwards made by the mortgagee or her representatives for the payment of interest on the mortgage money. Bearing in mind that the mortgage exceeded, as it certainly did, five-sixths of the purchase-money, the question is, whether such a course of dealing is not to be treated as affording ground for the inference that there was a set-off at the time when

possession was taken of one debt, as far as it went, against the other. I think it must be so treated.

A set-off was recognized as a reasonable act, and nothing more, by this Court long before it found its way into a Court of Common Law. By the common law, there was no such thing as set-off. By the civil law, cross debts were, by mere operation of law and independently of the acts of the parties, extinguished. Set-off or compensation, according to the language of the civilians, was *ipso jure*, (a) and there was an end of the debt *pro tanto*. That which was long the doctrine of this Court, in process of time and by the act of the legislature, became with certain modifications, and is now, the established law of all the Courts of the country. I admit that there may be circumstances where, although set-off may exist, you cannot retrospectively say there has been a set-off, either at law or in equity. The case of *Pettat v. Ellis*, (b) referred to by the respondents, is an example of such a character.

* 257 * This much, however, I think may be stated as a very safe proposition, that the principle of set-off is quite consistent with natural equity, and that where it can be adopted, it is an arrangement which this Court will be very ready to assist, while it will look to any circumstances that occurred at the time when persons became reciprocally indebted, in order to say that a set-off did in fact take place. In the present case, from the circumstance that possession was taken in 1842 by the mortgagee, and that no claim was made for interest by either party, I infer that, whether expressed or not, it was the agreement perfectly understood between the parties that the one debt should wipe off a portion of the other debt; in effect, that there should *pro tanto* be a set-off. I do not, therefore, feel called upon to speculate as to the exact course this Court would have pursued if the parties had, in the year 1842, adversely asserted against each other their mutual rights; but not having done so, they must be understood, like reasonable persons, to have adopted an arrangement perfectly obvious and in conformity with what ought to have been done.

So much, therefore, of the Vice-Chancellor's decree as directs a reference as to title and as fixes the date from which the calculation of interest upon the purchase-money and on the mortgage is to commence, will be varied by striking out the reference as to title, and by declaring that the principal and interest due on the

(a) Dig. Lib. 16, tit. 2, l. 21.

(b) 9 Ves. 563.

mortgage ought to be considered as having been applied in discharge *pro tanto* of the purchase-money due at the time when the defendants' testatrix entered into possession. The balance of the purchase-money then due will bear interest at 4l. per cent.

The Lords Justices concurred.

* The counsel for the appellants then submitted that the * 258 plaintiffs, having succeeded in obtaining a decision in their favour upon the only matter in dispute, were entitled, not only to the costs of the suit in the Court below, but also to those of the appeal.

The Lord Chancellor, however, said that, looking to the justice of the case, neither party was entitled to costs ; that the delay was in a great measure attributable to the plaintiffs by reason of the loss of the title-deeds, but that both parties appeared to have slept on their rights until it became absolutely necessary to have recourse to the interference of the Court.

* WATLINGTON v. WALDRON.

* 259

1853. December 14. Before the Lord Chancellor Lord CRANWORTH, and the Lord Justice TURNER.

A testator, by his will, devised all his real estates to trustees for ninety-nine years, without impeachment of waste, and, subject thereto, to the use of his son for life, without impeachment of waste, with remainder to the use of his granddaughter for life, without impeachment of waste, with remainder to her first and other sons in tail, &c. The trustees of the term were, in the event of his personal estate being deficient, to raise money to pay debts and legacies. The will contained an express provision against cutting down any timber on the estates, except for necessary repairs, until the granddaughter should attain twenty-one, at which time the trustees were empowered to cut such timber "as they shall think fit," and to sell and pay the proceeds to the granddaughter. The son entered into possession and died before the granddaughter attained twenty-one. She then became tenant for life. Some time afterwards, and after she attained her majority, the trustees sold the term by auction in order to pay debts. It was stated in one of the conditions of sale that the estate was sold subject to any rights under the provisions in the will. *Held*, that the will created no obligatory trust in favour of the granddaughter, but that the power to the trustees to cut, &c., was merely discretionary.

THIS was a special case involving the determination of a question which had arisen in a suit before the present Lord Chancellor when Vice-Chancellor; and although a decision upon that occasion was pronounced by his Lordship affecting the main point raised in the case, it was agreed by all parties interested, that the questions now before the Court were not concluded, and the present special case therefore, by his Lordship's permission, came on to be heard in the first instance before his Lordship, assisted by the Lord Justice TURNER.

By the will of John Webb, dated 31st July, 1826, he gave and devised all his real estates "to the use of John Clacy, Daniel Wiltshin, and Daniel Wiltshin the younger, their executors, administrators, and assigns, for the term of ninety-nine years, without impeachment of or for any manner of waste, upon the trusts and for the purposes thereafter declared; and from and after or other sooner determination of the said term and subject thereto and to the trusts thereof to the use of his son William Butler

Webb and his assigns, for and during the term of his
 • 260 • natural life, without impeachment of or for any manner of waste, with remainder to the trustees of the term to preserve contingent remainders; and from and after the decease of his said son William Butler Webb, to the use of his granddaughter Caroline Sarah Webb and her assigns, for and during the term of her natural life, without impeachment of waste, with remainder to the same trustees to preserve contingent remainders; and after the decease of his said granddaughter Caroline Sarah Webb, to the use of the first and other sons of his said granddaughter Caroline Sarah Webb successively in tail, with remainder to the use of all and every the daughter and daughters of his said granddaughter Caroline Sarah Webb, as tenants in common in tail, with cross remainders in tail." And the said testator declared that the said term of ninety-nine years thereinbefore limited to the said John Clacy, Daniel Wiltshin, and Daniel Wiltshin the younger, their executors, administrators, and assigns, was so limited to them, upon the trusts and for the purposes thereafter mentioned (that was to say), in case his personal estate should happen to be insufficient to pay and satisfy the several legacies thereinbefore bequeathed, and the sum of 4,000*l.* charged on his Norcut estate by his son William Butler Webb's marriage settlement (in the event of that sum becoming payable), upon trust

that they the said John Clacy, Daniel Wiltshin, and Daniel Wiltshin the younger, or the survivors or survivor of them, his executors, administrators, or assigns, should by, with, and out of the rents, issues, and profits of all and singular the said last-mentioned messuages, farms, lands, tenements, and hereditaments, or by demise, mortgage, or sale of the whole or part thereof, or by all and every or any of the ways or means, levy and raise such sum of money as should be sufficient to answer, satisfy, and make up such deficiency. And the testator thereby ordered and declared, that after answering the trusts and purposes * aforesaid the term of * 261 ninety-nine years should cease. The will of the testator contained the following proviso: "Provided also, and I do hereby declare, that it shall not be lawful for my son William Butler Webb to cut any part of the timber standing, growing, or being upon my said farms and lands situate in the estate of Norcut aforesaid for any purpose whatever, except for necessary repairs, nor to pull down any of the buildings now standing or being on the said farms and lands, nor to commit any kind of waste whatever: provided also, and it is my will and meaning, and I do hereby order and direct, that no part of the timber standing, growing, or being in or upon or about the residue of my said freehold lands, tenements, and hereditaments, shall upon any pretence or any purpose whatsoever (except for necessary repairs) be felled or cut until my said granddaughter Caroline Sarah Webb shall attain the age of twenty-one years, at which time it shall be lawful for my said trustees to mark, fell, cut down, cart, and carry away such timber as they shall think fit, and to sell and dispose of the same for such price or prices, sum or sums of money as they may think proper, and pay the money to arise or be produced by such felling, sale, and disposition (after deducting the charges and expenses attending the same) unto my said granddaughter Caroline Sarah Webb, for her own sole and separate use and benefit, to whom I do hereby give and bequeath the same." The testator appointed his son the said William Butler Webb, John Clacy, Daniel Wiltshin the elder, and Daniel Wiltshin the younger, executors of his said will.

The testator died on the 1st March, 1828, leaving William Butler Webb, his son and heir. His will was proved by Daniel Wiltshin the younger.

By a decree bearing date 15th June, 1832, in a cause
 * 262 * in which William Butler Webb was plaintiff, and Christian Grace and others defendants, and also in a cause in which William Butler Webb was plaintiff, and Daniel Wiltshin defendant (the two other trustees having disclaimed), the will of the said testator was established, and the usual accounts and inquiries directed.

William Butler Webb died in May, 1835, leaving Caroline Sarah Webb, his only child, him surviving, who attained twenty-one on the 4th October, 1836.

By a decree made in the above and certain other suits of revivor and supplement on the 24th March, 1841, and after stating that the personal estate of the testator was exhausted, and that it was admitted that the term of ninety-nine years in the lands devised by the residuary clause of the said testator's will would be wanted, it was ordered, among other things, that the Master should proceed to a sale of the lands comprised in the term for the residue thereof.

Caroline Sarah Webb married the defendant Henry Waldron and died on the 26th November, 1842, leaving one only child, the defendant Caroline Elizabeth Waldron. Administration of the estate and effects of the said Caroline Sarah Waldron was granted to her husband Henry Waldron.

In pursuance of the decree of the 24th March, 1841, part of the hereditaments comprised in the residuary clause of the testator's will was put up for sale for the residue of the term of ninety-nine years on the 18th January, 1843, in several lots, and subject to certain conditions of sale, but only one of which related to the
 question in controversy between the parties to the special
 * 263 * case, and which condition was in the following terms:

“The said John Webb, the testator, by his will directed that no part of the timber upon the said hereditament should (except for necessary repairs) be felled or cut until his granddaughter Caroline Sarah Webb should attain the age of twenty-one years, at which time it should be lawful for his trustees to fell, cut down, cart, and carry away such timber as they should think fit, and dispose of the same for such price or prices as they should think proper, and pay the money to arise therefrom (after deducting the charges and expenses attending the same) unto his said

granddaughter. The estates comprised in the accompanying particulars are put up for sale, subject to any rights under such provision."

William Watlington became the purchaser of the whole of the premises, the largest portion of which were sold by public auction, and the residue by private contract, for the sum of 5804*l.*, and the purchases were confirmed by this Court, and the purchase-money paid into the Bank of England to the credit of the causes; and the term of ninety-nine years was duly assigned to him, subject to the sixth condition of the sale.

By an order made in the original and supplemental and revived suits, bearing date the 26th July, 1849, it was, amongst other things, ordered that it should be referred to the Master to whom the said causes stood referred, to inquire and state to the Court to whom the timber upon the estates and premises comprised in the term of ninety-nine years, which had been sold as therein mentioned, belonged at the time of such sale. The Master, by his report bearing date the 3d July, 1850, made in pursuance of the last-mentioned order, and which has been duly confirmed, stated and certified, amongst other things, that he found that the testator's * granddaughter, Caroline Sarah Webb, * 264 attained her age of twenty-one years on the 4th October, 1836, and that John Clacy, Daniel Wiltshin, and Daniel Wiltshin the younger, the trustees in that behalf in the said testator's will named, did not subsequently to the 4th October, 1836, cut down any timber upon the estate and premises comprised in the term of ninety-nine years; and that the timber upon the estate and premises comprised in the term of ninety-nine years, which had been so sold as in his general report mentioned, belonged to the defendant Catherine Elizabeth Waldron, as reversioner in fee under the will of the testator, and as heiress-at-law of the testator, and of her mother, Caroline Sarah Waldron. William Watlington was not a party to the suits, nor to the last-mentioned inquiry.

The bequest of the timber, which the trustees of the testator were empowered by his will to fell and cut on his said granddaughter's attaining the age of twenty-one years, was never assented to by his executors, in consequence, as Henry Waldron and C. E. Waldron alleged, of the disclaimer by two of the executors and the institution of the before-mentioned suit.

Shortly after the purchase of W. Watlington had been confirmed,

C. E. Waldron presented a petition, which came on to be heard before the Vice-Chancellor Lord CRANWORTH, praying that she might be at liberty to enter upon the lands and premises comprised in the term of ninety-nine years sold by the Master, and to work, fell, cut down, cart, and carry away such of the timber standing and growing upon such lands and premises as should be fit and proper to be felled and cut down, and to sell and dispose of such timber, either standing or after it might have been cut down, as to her might seem most desirable and advanta-

* 265 geous; and after payment of costs, * to pay the residue of the money arising from such sale or sales as aforesaid into Court to the credit of that cause, to an account to be entitled "the timber account of the defendant C. E. Waldron," and that all dividends and accumulations of dividends might be invested in like manner; or that there might be a reference to the Master to ascertain what timber, if any, then standing and growing upon such lands and premises was fit and proper to be felled and cut down; and if the said Master should find that there was any timber fit and proper to be cut, then that he, or the petitioner under his direction, might proceed to a sale of such timber, and pay the proceeds into Court to be invested.

The petition was opposed by W. Watlington, and his Lordship upon that occasion, by an order dated the 21st February, 1851, directed that the petition should be dismissed with costs.

Instead of appealing, the petitioner, C. E. Waldron, consented to have the question respecting the right to the timber determined by a special case.

The following three questions were now presented for the decision of the Court.

1. Whether J. H. Watlington, the devisee of the purchaser W. Watlington, has or has not the right to fell, cut, and carry away for his own use, and not for repairs merely, such of the timber now standing, growing, and being, or which may hereafter during the term of ninety-nine years be standing, growing, or being, in and upon the estate and premises comprised in the term, as he may think proper.

2. Whether C. E. Waldron has or has not the right,
* 266 * under the circumstances hereinbefore stated, to fell, cut, and carry away the timber for her own use.

3. Whether Henry Waldron has or has not any and what right or claim to the timber or to any part thereof.

Mr. Russell and *Mr. Morris*, for J. H. Watlington, the plaintiff. — With respect to the claim of Henry Waldron, the trustees of the term being unimpeachable of waste, the effect of the clause restraining the cutting of timber till the granddaughter attained twenty-one did not diminish their rights ultra, and after that time the trustees had a discretionary power, unless it can be contended that the words of the will amounted to an absolute gift of the timber to the granddaughter. Admitting that the conditions of sale expressly left the purchase open to the operation of any right which might be made, still that did not create or give a validity to the claim of the granddaughter greater than existed before the sale. With respect to the claim of C. E. Waldron as the reversioner, she could only have a right to timber unlawfully cut after the expiration of the term, and it therefore is still more untenable than that of the granddaughter's representative.

Mr. Bacon and *Mr. Lonsdale*, for Henry Waldron, the administrator of his wife. — The purchaser of a term has not the right *prima facie* to the timber. The words "as they shall think fit" must apply to the fitness of the timber for cutting, and, had the sale taken place during the minority of the granddaughter, there could have been no doubt as to her title. In this case the trustees had no right to exercise a discretion which was opposed to the obligations of the trust which they had accepted. In the language of Lord NORTHINGTON: "If a bill had been brought against the trustees to * assign, allow, or direct timber mature and * 267 fit to be cut, would it have been an answer, we do not think fit to allow it, *stat pro ratione voluntas*. I think the Court would not have been satisfied with such an answer." *Hewett v. Hewett*. (a) The words "without impeachment of waste" may be controlled; taken alone they give privileges incident to the estate, but, as observed by PARKER, V. C., in the case of *Briggs v. Earl of Oxford*, (b) "All those privileges are capable of being qualified at law, and also by way of trust in this Court." In this case there will be enough for the clause to operate upon, even if the timber

(a) 2 Eden, 332, see p. 335.

(b) 5 De G. & Sm. 156; see p. 170.

is withdrawn from the operation of the trust. When, as in the present instance, the will contains evidence on the face of it both of a general and of a particular intention, the latter will prevail over the former; here there is an absolute gift of the timber, and if that gift had preceded instead of following the discretionary clause to the trustees, all doubt would have been removed.

Mr. J. Baily and *Mr. Hoffman*, for C. E. Waldron, the heiress-at-law of the testator and of C. S. Waldron, adopted the same line of argument as to the discretion of the trustees being subordinate to their obligation; but submitted, assuming the decision of the Court was against the purchaser, that it ought to be in favour of C. E. Waldron, in accordance with the Master's finding.

Lord Justice TURNER, in the course of the argument, referred to *Fordyce v. Bridges. (a)*

Without calling for a reply, the Lord Chancellor said: This case does not admit of any reasonable doubt. At the
* 268 * date of the testator's will, in 1826, his granddaughter, C. S. Waldron, was eleven years old. The testator died in 1826. His son, the first tenant for life, died in 1835.

The question is whether the proviso restraining the cutting of timber during the minority of the granddaughter had the effect of preventing the trustees, in the exercise of their power of sale of the term of ninety-nine years, from making a title to the timber. It might have been necessary to have sold the term immediately on the testator's death, and it is an extremely improbable intention to impute to him that he contemplated the sale of the estate with such a clog upon it, as that the trustees might at any time afterwards enter and cut the timber, and give it to the granddaughter. There is no difficulty, however, in understanding the proviso as applicable and referring only to the estates while enjoyed by the son. In my opinion the testator never contemplated that it should apply to the term of ninety-nine years. The testator has directed that no part of the timber shall, except for necessary repairs, be felled until his granddaughter attained twenty-one, "at which time it shall be lawful for my trustees to

(a) 2 Phil. 497.

mark, fell, cut down, cart, and carry away such timber as they shall think fit ;” the son having an interest during his life unimpeachable of waste. It appears to me that the words “ as they shall think fit ” clearly refer to the discretion of the trustees, and do not mean such timber as might be ripe or fit for the axe.

If the granddaughter had not outlived her father, there would have been no doubt in the matter, but the contingency which the testator thought it right to provide against was the event of the granddaughter attaining twenty-one in the lifetime of her father. It so happened that she attained twenty-one after the death of her father, when she herself acquired an estate for life unimpeachable of * waste, and it would be idle to refer the pro- * 269 vision to that state of circumstances. By this construction we are enabled to avoid the anomaly to which I have already referred, of there being a power of sale of the term, with a reservation of the discretionary right of entry to cut timber.

THE LORD JUSTICE TURNER. — If the provision restraining the cutting of timber during the minority of the granddaughter is to be read as an absolute gift of the timber to her, two clauses of the will are rendered inconsistent, the power of selling the property for the term without impeachment of waste not being reconcilable with such a gift. The whole will, however, is consistent if it be construed as giving the trustees of the term a power merely discretionary, to be exercised in a proper state of circumstances, such as that of the granddaughter attaining twenty-one in her father's lifetime. The case of *Hewett v. Hewett* (a) is distinguishable from the present, because in that case the successive tenants for life were impeachable of waste, and no timber could be cut except by the leave of the trustees. It might well have been there held to be incumbent on the trustees to exercise the power. In the present case the life-estates are limited expressly without impeachment of waste.

(a) 2 Eden, 332.

1853. December 14. 1854. January 25. Before the Lord Chancellor Lord CRANWORTH and the Lord Justice TURNER.

An attorney was engaged in the sale of his client's property by auction, on which occasion a small portion only of the property was sold. He was subsequently employed in making out abstracts of title of the portion unsold, and sixteen months after the completion of the abstracts, during which term there had been no employment of the attorney professionally by the client, the attorney bought a portion of the unsold property, and debited the client in his books for drawing the agreement for sale. The consideration which was on the face of the purchase deed stated to have been paid, was in fact composed partly of a previous debt for costs, and partly of such an annuity as the balance of the purchase-money would, according to the government tables, obtain for a healthy life. The client died three years and a half after the sale. It was in evidence that the client was of intemperate habits for many years previously and up to the transaction in question. It did not appear that the attorney had made any special inquiries as to the state of health of the client, or endeavoured in any other quarter to obtain a higher annuity, which from the intemperate habits of the client might in all probability have been procured: *Held*, on a bill filed by the heir-at-law of the client, to set aside the transaction, that the relation of attorney and client subsisted at the time of the sale, and that the attorney had failed to show that no industry he was bound to exert would have got a better bargain for his client, and the sale was accordingly set aside.¹

THIS was an appeal by the defendant, a solicitor, from the decree of the Vice-Chancellor STUART, setting aside, at the suit of the heir-at-law of the vendor, two purchases by the defendant of real estate, on the ground that the relation of attorney and client subsisted at the time of the sales, and that the defendant had not duly protected the interests of the plaintiff's ancestor.

The material circumstances of the case, and the several points raised on the hearing of the appeal, are sufficiently stated, for the purpose of this report, in the judgment of the Lord Chancellor.

Mr. Daniel and *Mr. Wickens*, for the plaintiff, the respondent.

¹ See 1 Story Eq. Jur. §§ 310, 311, and notes; *Newman v. Payne*, 2 Ves. (Sumner's ed.) 199, note (a); 1 Lead. Cas. in Eq. (3d Am. ed.) [134, 135], 202, 203 in notes to *Fox v. Mackreth*; *Hindson v. Weatherill*, 5 De G., M. & G. 301; *Gresley v. Mousley*, 4 De G. & J. 78; *Lyddon v. Moss*, 4 De G. & J. 104.

Mr. Willcock, Mr. J. H. Taylor, and Mr. Spinks, for the defendant, the appellant.

Mr. Wickens, in reply.

The following cases were cited and commented upon in * the argument: *Gibson v. Jeyes*; (a) *Cutts v. Salmon*; (b) * 271 *Wood v. Downes*; (c) *Montesquieu v. Sandys*; (d) *Cane v. Lord Allen*; (e) *Edwards v. Meyrick*; (g) *Jones v. Thomas*; (h) *Austin v. Chambers*. (i)

THE LORD CHANCELLOR.—The bill in this suit was filed by the plaintiff, as heir-at-law of Charles Holman, to set aside two sales of real estate made by Charles Holman to the defendant, who is an attorney. The grounds upon which the sales are impeached are the alleged relationship of attorney and client, and that the defendant did not duly protect the rights of the plaintiff's ancestor in the transactions in question. The first sale impeached took place in the month of July, 1848; the second, in December, 1850.

In 1846 there had been an attempted sale by auction of the whole of the property of Charles Holman; on which occasion it was put up for sale in nine lots, but only one of the lots was then sold. In the month of July, 1848, Charles Holman sold to the defendant four of the lots; the consideration being expressed to be 600*l.*, though only 260*l.* can be said to have been paid, and an annuity of 40*l.* for the life of Charles Holman. In December, 1850, there was a sale of the remaining four lots to the defendant, the consideration for which was an annuity of 26*l.*, on similar terms. In February, 1852, Charles Holman died. In June, 1852, the present bill was filed. The defence is, first, that the relation of attorney and client did not subsist; and, secondly, that if it did subsist, the conduct of the defendant was altogether proper. Now, if the relation of attorney and client subsisted, the rule of law I take to be clear, that there is nothing * absolutely * 272 preventing an attorney purchasing from his client, but then he assumes very heavy responsibilities; he cannot sustain his pur-

(a) 6 Ves. 266.

(b) 4 De G. & S. 125.

(c) 18 Ves. 120.

(d) 18 Ves. 302.

(e) 2 Dow. 289.

(g) 2 Hare, 60.

(h) 2 Y. & C. 498.

(i) 6 Cl. & Fin. 1.

chase "unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger." This is the language of Lord ELDON, in *Gibson v. Jeyes*; (a) and a little further on, in the same page, the same very learned Judge says, "But from the general danger the Court must hold that if the attorney does mix himself with the character of vendor, he must show to demonstration (for that must not be left in doubt) that no industry he was bound to exert would have got a better bargain."

What we have to decide, therefore, is, first, the question of fact, did that relation subsist which creates the obligation? and, secondly, if it did, then whether the defendant duly discharged the duties which attach upon such a relationship. The first question is one of fact, and the burden of proof is on the plaintiff. I think he has fully made out the proposition for which he contends, namely, that the defendant was the attorney of Charles Holman within the meaning of the rule; and I arrive at this conclusion mainly from the defendant's own books. It appears from those books that in 1836 the defendant acted as Charles Holman's attorney in an action against a person of the name of Nevill, and Charles Holman became indebted to him for the costs of that action; and in January, 1838, an arrangement was come to whereby the amount of those costs was fixed at the sum of 60*l.* The defendant on that occasion lent Charles Holman 40*l.*, and took from him a note for 100*l.* at five per cent interest, with a deposit of title-deeds. No further professional business

* 273 occurred until the year * 1843; in September of which year the defendant was engaged in preparing a lease for Charles Holman, to a Mr. Ellis, of land at Wells for seven years. The next transaction was the sale by auction in 1846, and that led to considerable employment by Charles Holman of the defendant. It appears from the books of Mr. Loynes that he was employed by Charles Holman in the ordinary way in which a client employs a solicitor in the sale of an estate. I see the entry of the 17th April, 1846: "Holman — Attending you this day respecting a sale of your estate at Wells. Conferring thereon. Taking instructions to offer the same for sale," &c. &c. It seems to me, therefore, that the defendant undoubtedly acted as the attorney for Charles

(a) 6 Ves. 266; see p. 271.

Holman in every way in which an attorney could act for a party who was about to sell, and did attempt to sell, his estate by auction. The auction took place on the 20th May, 1846. Only one lot, however, was actually sold, and from that time up to the 19th March, 1847, the defendant continued to act as the attorney for the vendor; he was engaged in carrying into execution the sale of the lot that was sold; he prepared the conveyance, and, in short, acted in every way as solicitor of the vendor in carrying that sale into execution. After the completion of that transaction the defendant prepared an abstract of title of the eight remaining lots, evidently that they might be ready for any purchaser who might offer. This carried on the business up to the month of April, 1847; what he had done up to and at that time was clearly as the attorney of Charles Holman. So the matter rested until July, 1848, when the defendant himself purchased. Now it appears to me clear that the defendant was at that time the attorney of Charles Holman in the matter of this sale. He had been put in a situation to communicate with any vendor who might offer, and, in truth, was the agent for the purpose of getting the estate sold. I do not attribute *any thing like personal miscon- * 274 duct to Mr. Loynes, the attorney, in thus communicating with Mr. Holman, the client; but the result was, that the attorney agreed to purchase from his client. If it was necessary to have additional proof beyond that already stated, to the effect that Mr. Loynes was the solicitor of Charles Holman at the time of his purchase, I think it is clearly made out by an entry in his own book of the 29th July, 1848: "Drawing purchase agreement for the sale of your premises at Wells to Mr. Loynes," (that is himself), "and fair copy thereof." Nothing can more completely indicate that he was at that time acting as solicitor for the vendor. If the defendant had not been himself the purchaser, but had been acting for some other person, it would have been, to all intents and purposes, the charge for acting as the solicitor of the vendor. I come, therefore, to the conclusion that he was the solicitor acting in the particular transaction for the vendor. That being so, the next question is, did he duly discharge his duty? Has he shown to demonstration, for that is what Lord ELDON says is necessary (though that must be taken with some qualification,—demonstration, literally meaning mathematical certainty, is impossible in such cases), but has he shown, what for want of a better expres-

sion we call moral certainty, that by no industry which he was bound to exert he could have got a better bargain for Charles Holman? I think he wholly fails in showing that.

As to the first purchase, I will assume that 600*l.* would have been a fair price for the property sold in July, 1848; but there was no 600*l.* paid. The real question is whether 340*l.* was, under the circumstances, a fair price for the annuity of 40*l.* a year. I think it was not. The value of such an annuity on an average life of Charles Holman's age, according to the government tables, appears to have been 380*l.*, or, as the answer

* 275 * states, 340*l.* But, in fact, Charles Holman's life was not a good average life. The evidence — not to go into detail — satisfies me that he was desperately addicted to drinking. One medical witness says he was not; but then he says he was a man of very gluttonous propensities, and in the habit of eating to excess; that he was excessively indolent, and would not take proper exercise, and that his health failed in consequence. The defendant Loynes knew this, or might have known it by the smallest possible inquiry, yet the value of that life was calculated at about ten years' purchase. In fact, he only lived three years and a half after the first transaction, and a year and a few months after the second. His death within so short a period after the sale would not be material if reasonable pains had been taken to ascertain that there was nothing materially to alter the value of his life as calculated from the tables, but I cannot find that any steps were taken for that purpose; no inquiry was made to see whether his life was insurable. I believe if such inquiry had been made it would have turned out to be clearly an uninsurable life; and if the solicitor had known that, he might well have bargained with a third person for an annuity greatly beyond the tables.

The second purchase took place in December, 1850, and was for an annuity of 26*l.* a year. Exactly the same observations apply to that transaction. The consideration is stated to be 208*l.* The value of such an annuity on the tables is said to be 232*l.*, but it is quite obvious it would have been very much less if the state of health and the habits of Charles Holman had been taken into account.

It is also to be observed, that the consideration is not correctly stated on the face of either of these deeds. The omission to state the exact circumstances of the case on the face of an instru-

ment of this nature might be of * very material importance, * 276 because, although the consideration of 600*l.* in the one case, and 208*l.* in the other, might be adequate and open to no suspicion ; yet, if the transactions had been correctly stated and presented in their true light, very grave suspicion might afterwards be excited. I do not place very much reliance upon this, as there was, no doubt, in the hands of Charles Holman a bond which correctly stated what the real transactions were. Still that might have been lost or separated from the other securities ; and it is in cases of this sort, therefore, essentially necessary, or very expedient at all events, that the exact truth should appear on the face of the instrument.

The defendant adduced several cases, as showing that the law, as laid down in *Gibson v. Jeyes*, (*a*) is not applicable to this case, but I do not think that any one bore him out in his proposition. The first case relied upon was that of *Montesquieu v. Sandys* ; (*b*) there the subject-matter of sale was of a very peculiar description, namely, an undivided fourth part of an advowson and right of presentation to a rectory. The advowson was at the time of the sale vested in one of four coparceners, a gentleman in the prime of life, forty-eight years of age, and very healthy ; one of the other coparceners had the next presentation, the next turn after that being vested in the plaintiffs. As was truly argued in that case, the value of such a property is entirely of a speculative nature, like a lottery ticket, the advantage depending entirely on the event, but it is in truth of no marketable value. Although it was bought by the attorney from his client, both of them had exactly the same knowledge in the matter ; there was not the least pretence for saying that one had known more than the other. It was in evidence that the client had himself offered to sell his right for 100*l.* to the attorney. It turned out that the incumbent was accidentally * thrown from his horse and killed, almost immediately * 277 after the transaction took place, and the person appointed as his successor was an old life ; the result of which was, that what was purchased was in truth the next right of presentation after a bad life. That, however, was the effect of such a mere accident, clearly out of the contemplation of either party, that Lord ELDON thought it was a case in which the doctrine recognized in *Gibson*

(*a*) 6 Ves. 266.

(*b*) 18 Ves. 302.

v. *Jeyes* (a) did not apply; that, although the defendant did stand in the relation of solicitor to the vendor, yet that the parties in truth, as to that property, were dealing at arm's-length.

The defendant also relied on the case of *Cane v. Lord Allen*; (b) but in that case I do not see how any question could have been raised. There the attorney had, by three separate transactions, purchased a very considerable estate from his client, it is true; but these transactions were unimpeached for upwards of forty years, and admitted by the vendor to have been quite correct. Of one of the purchased estates the attorney could not obtain the immediate possession, because there was a life upon it. By the contract, therefore, he agreed to purchase it subject to the life; and if that transaction alone had been impeached, it might have been upon the ground of its being a purchase of a reversion under value. There was, however, no evidence of its having been sold at an under value. Both in the Court below, in Ireland, and in the House of Lords, the three transactions were considered as forming one transaction, and it was thought that they ought all to stand or fall together. It was held that the relation of attorney and client did not exist, that there was no evidence of imposition, and that, it being all one transaction, there was nothing to impeach the conduct of the solicitor.

* 278 * The case before Sir JAMES WIGRAM, of *Edwards v. Meyrick*, (c) was also relied upon by the defendant; but in that case it would have been straining the doctrine to a most inconvenient extent to have applied it, because the full value had been given for the estate at the time when sold; but a short time after the sale an Act of Parliament passed for making a railway, the result of which was that the value of the property, consisting of minerals theretofore unworkable, was most materially increased. Such a contingency any person purchasing property may always look to; but there being in that case no doubt that the purchase was perfectly honest and fair according to the then value, Sir J. WIGRAM held that that accidental circumstance — such a contingent advantage which might or might not have been in the contemplation of the parties — did not afford ground for imputing fraud or improper concealment to the attorney, or impeach his conduct as the purchaser. Every case must depend on its own circumstances; here,

(a) 6 Ves. 266.

(b) 2 Dow. 289.

(c) 2 Hare, 60.

I think, the real neglect of duty was the not endeavoring to get, as in all probability the defendant might have got, a considerably higher annuity for Charles Holman, by reason of his intemperate habits. On that ground I think the defendant did not do his duty as he ought to have discharged it. I do not impute moral fraud to him; but in this Court such a transaction cannot stand, and the decree, therefore, of the Vice-Chancellor must be affirmed.

The Lord Justice TURNER, after stating the general nature of the case, said: The evidence fully satisfies my mind that Holman's life was not at the dates of these transactions an ordinary life; that he had been addicted to excessive drinking, and that his habits had impaired his health; that he was affected by shortness of breath, laboured under difficulty in walking, and was unequal to bodily exertion; and, * therefore, that the annui- * 279 ties of 40*l.* and 26*l.* were not equal in value to the sums of 340*l.* and 208*l.* at which they were estimated, and which were the values according to the tables calculated on ordinary lives.

It may be admitted, that if these transactions had taken place between Holman and any person not standing in a confidential relation towards him, they could not have been successfully impeached upon the ground of inadequacy of consideration or upon any ground appearing upon the evidence in this cause,—that a mere stranger having thus dealt with Holman would have been entitled to retain to himself the benefits derived from these purchases. The question before us is, whether the defendant is so entitled; and this question appears to me to resolve itself into three points: first, whether at the times when these transactions took place, the defendant is to be considered to have stood in a confidential relation towards Holman; secondly, what were the duties incumbent upon the defendant in consequence of that relation, if it is to be considered to have subsisted; and, thirdly, whether those duties have been duly and properly discharged.

As to the first point, it was urged with much force upon the part of the defendant, that, when he made these purchases from Holman, he stood in no relation of confidence towards him, and was entitled to deal with him as any stranger might have done,—that he was not, as it was said, attorney *in hac re*; and several authorities were referred to upon the question, in what cases an attorney, dealing with a client, was to be considered as not having

been attorney *in hac re*, and was entitled to deal with the client as a stranger. The great importance of this question, as affecting transactions between attorney and client, has led me care-
 * 280 fully to examine those cases; and, upon * examining them, I am satisfied that they fall far short of what would be necessary to maintain, in this case, the position for which the defendant has contended. Lord ELDON, in *Montesquieu v. Sandys*, (a) confines these cases within very narrow limits. The case he puts is that of an attorney purchasing "what was not in any degree the object of his concern as attorney; the client making the proposal, himself proposing the price, no confidence asked or received in that article, and both ignorant of the value." Under such circumstances, he says, the attorney is not the attorney *in hac re*; and, therefore, not being under any duty to advise his client against the act (meaning of course the purchase by himself), he may be the purchaser. Sir JAMES WIGRAM, in *Edwards v. Meyrick*, (b) treats the expression "attorney *in hac re*," as applied to that case, as one more of form than of substance; but he examines the principles of the Court with respect to the dealings between attorney and client, and shows that the control exercised by the Court over such dealings is part of its general system for preventing any undue advantage being taken by persons in whom confidence has been reposed. The case itself goes no further than to hold that a purchase by an attorney from a client could not be impeached upon the mere ground that a possible speculative advantage, which might have been known to the client as well as to the attorney, had not been made the subject of distinct communication by the attorney to the client. Sir JAMES WIGRAM, however, in that case held, that the *onus* rested on the defendant to show that the treaty was fairly conducted; and, in another part of his judgment, he refers to a circumstance which is not wanting in the present case, the disadvantage at which the client is placed from his being indebted to the attorney. Lord ABINGER again in
 * 281 *Jones v. Thomas*, (c) a case the circumstances of * which are so remote from the present that it is unnecessary to state them, deals with the expression "attorney *in hac re*," and he treats it as referring to cases in which the transactions are entirely unconnected with the duty of the attorney. The cases, therefore,

(a) 18 Ves. 313.

(b) 2 Hare, 60.

(c) 2 Y. & C. 498.

in which it has hitherto been held that an attorney may deal with a client as a stranger might do, are not cases in any degree, resembling the present. They are not cases in which the attorney has been concerned in any previous attempted sale, or in which any confidence as to sale has been reposed in him as attorney; or cases in which the attorney has acquired, or has had the means of acquiring, any peculiar knowledge as to the property the subject of the sale to him. The result of them, stated most favourably to the defendant and without reference to the important observations upon the subject of influence made by Sir JAMES WIGRAM in *Edwards v. Meyrick*, cannot be put higher than this, — that an attorney may deal with a client as a stranger where the circumstances are not such as to put him under the duty of advising the client. This is the position with which Lord ELDON has summed up his observations upon the subject in *Montesquieu v. Sandys*; and this case may, I think, well be tried by that test.

It was not of course attempted to be denied that the defendant, whilst he was concerned in the sale by auction and the business arising out of it, was under the duty of advising Holman; and the question therefore is one of determining a duty which has once attached, and not, as in the cases which were cited, of imposing a duty which had not before existed. It was said, that this duty of advising ceased when the sale by auction, in which the defendant was concerned, was at an end, or, at all events, when the costs incident to that sale were settled; but the purpose of sale continued so far as Holman was * concerned. As to him, the sales to * 282 the defendant were a continuance of the same business in which the defendant had been engaged; and I see no ground upon which the case can be put on one footing as to Holman, and on another as to the defendant. Again, it was said that the relation of attorney and client had wholly ceased; but it may be asked, when did it cease? If these transactions had taken place the day after the business of the sale by auction was at an end, could it have been said that the parties stood towards each other in any different relation from that in which they had before stood? Could the defendant in such a case have been absolved from the duty of advising Holman? I think clearly not. Does, then, the lapse of time between the auction and the defendant's purchases alter the case? It does not appear to me that it does. No other solicitor had in the mean time been employed by Holman; and the true state of

the case appears to me to be, that there was not any cessation of the relation, but only a cessation of the circumstances which were necessary to call the relation into action. I may add, upon this part of the case, that it is not perhaps unworthy of remark, that, in these cases where attorneys have been concerned in previous sales, there must, in some sense, be a continuance of the confidential relation between them and their clients. They must be bound in any future dealings with the client, as to the property which they have been employed to sell, to communicate any information respecting that property which they have obtained during their employment. No attorney could, as I apprehend, be permitted to use in any such dealing information which he had so obtained without disclosing it to the client. These are the observations which have occurred to my mind in this case, without reference to the question of influence suggested

in *Edwards v. Meyrick*; (a) but I agree with Sir JAMES
 * 283 * WIGRAM that that question must also be considered in cases of this nature. The very ground of the rule which requires attorneys purchasing from their clients, and not advising them with reference to the purchase, to prove that the confidential relation has been determined or the client put at arm's-length, is the influence which arises from the position of attorneys; and I much doubt whether the confidential relation can be said to be determined at all whilst the influence derived from it can reasonably be supposed to remain. Gifts from clients to their attorneys can be maintained only when not only the relation has ceased, but the influence may rationally be supposed to have ceased also. That was laid down by Lord ELDON in *Wood v. Downes*; (b) and I see no reason why the rule which applies to gifts, should not equally in this respect apply to purchases. It is true that the rules of the Court against gifts are absolute, and that against purchases they are modified; but this is a question, not upon the extent of the rules, but upon the circumstances under which they are to be brought into operation, and in that respect I see no difference between the cases of gifts and purchases. The defendant relied much on Holman having been assisted by Houghton in the transaction of these purchases; but, however competent Houghton might be to judge of the value of the property, he was not the person to judge of the terms on which that value ought to have been converted into an-

(a) 2 Hare, 60.

(b) 18 Ves. 120.

nuities ; and, besides, if the defendant was under the obligation of advising Holman, he must also, I think, have been under the obligation of supervising Houghton.

My opinion, therefore, upon this branch of the case is, that the defendant must be considered to have stood in a confidential relation to Holman when these transactions * took * 284 place ; and I am the better satisfied to have arrived at this conclusion, because I think any extension of the powers of attorneys to deal with their clients as strangers might deal with them, would be dangerous in the highest degree, and would open a door to undue advantage being taken in cases in which it is now prevented by the rules of the Court. Those rules require no more than that the client should be fully informed and duly and honestly advised, and that the price should be just ; and this, I think, is not too much to be required of parties in whom confidence is reposed.

We come, therefore, to the second question, — What were the duties incumbent upon the defendant in consequence of the subsistence of this confidential relation ? and this part of the case seems to me to admit of no doubt. The case of *Gibson v. Jeyes* (a) appears to me to be conclusive upon this point.

There remains then only the third question, — whether the duties incumbent upon the defendant were duly discharged. And on this it is sufficient to say that in my opinion the value of these annuities was not properly taken from the tables, and that the securities for the annuities were not such securities as this gentleman would have been bound to have advised Holman to have taken, if the transaction had been a sale by Holman to a third person. I concur in the opinion which the Lord Chancellor has expressed, that this appeal must be dismissed and with costs.

(a) 6 Ves. 266.

* 285 * In the Matter of The PENNANT AND CRAIGWEN CONSOLIDATED LEAD MINING COMPANY, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848, 1849.

FENN'S CASE.

1854. February 10, 15. Before the Lord Chancellor Lord CRANWORTH, and the LORDS JUSTICES.

By one of the rules of a mining company, carried on under the "cost book principle," it was provided that any shareholder might determine his responsibility or liability upon giving notice in writing to the purser of his desire of retiring and upon depositing with the purser the transfer of the shares held by him and signing a relinquishment of all claims or demands on the company in respect of such shares: the prospectus of the company also stated that under the cost book principle shareholders had the right of determining their responsibility by giving notice of their intention to relinquish their shares and on forfeiture of all previous payments. A. B., a shareholder in the company, gave notice in writing to the purser of his desire to retire and thereby relinquished all right and title to his shares: *Held*, on winding up the company, that under the terms of the rule as explained by the prospectus A. B. had by his notice absolved himself from all liability to the past and future debts of the company.¹

THIS was a rehearing before the full Court of Appeal, at the instance of the official manager, of an appeal presented by Joseph Fenn against the decision of the Master charged with winding up the above company, and which appeal had been decided by the Lords Justices in favour of J. Fenn, on the 28th July, 1853. The following are the facts of the case:—

The Pennant and Craigwen Consolidated Lead Mining Company was formed in 1848 for the working, on the cost book principle, of certain lead mines in the county of Merioneth, the scheme being in fact an amalgamation of two mining associations which had previously been working separately. The prospectus, which bore date the 2d October, 1848, contained the following statement: "The operations of the company are carried on under the 'cost book' principle, which exempts the company from the provisions

¹ See 1 Lindley Partn. (Eng. ed. 1860) 111, 112; 2 *Id.* 1132, 1133; Birch's Case, 2 De G. & J. 10; Lofthouse's Case, 2 De G. & J. 69; Mahew's Case, 5 De G., M. & G. 837; Bodmin United Mines, 23 Beav. 370.

of the Act for the Registration of Joint-stock Companies (7 & 8 Vict. c. 110), the 63d section of which enacts: 'Provided always, and * be it enacted, that nothing in this Act * 286 contained shall extend, or be construed to extend, to any partnership formed for the working of mines, minerals, and quarries, of what nature soever, on the principle commonly called the cost book principle.' The capital realized is considered a sum sufficient to bring the undertaking into a paying state; but in the event of more being required for general purposes, the third clause of the 'cost book' provides: 'That no call be made without the consent of three-fourths of the shareholders, either in person or by proxy, at a public meeting convened for the purpose.' Under the 'cost book' principle shareholders have the right of determining their responsibility by giving notice of their intention to relinquish their shares, and on forfeiture of all previous payments. The 24th clause states: 'That any shareholder may determine his or her responsibility or liability, with respect to the affairs of these mines, upon his or her giving notice in writing to the purser of the company for the time being of his or her desire of retiring from the company, and also upon depositing with the said purser the transfer of the share or shares held by him or her, and signing a relinquishment of all claims or demands on the company in respect of such share or shares.' Under the amalgamated arrangement there are 8000 parts or shares of 2*l.* per part or share paid." To this prospectus was attached a list of rules and regulations, which had been previously agreed upon, and among these were the clauses (being numbers 3 and 24) mentioned in the prospectus, and also the following; namely, — "4. That if any shareholder shall omit or refuse to pay any call for the space of one month after the same shall have been made, and due notice thereof given to such shareholder, then the share or shares of such shareholder shall be forfeited and become the property of the remaining shareholders."

* J. Fenn became the holder of ninety-eight shares in the * 287 company on the 17th April, 1848, but he did not sign the cost book. It appeared that, after the formation of the company, leases of the mines intended to be worked were obtained by the company; that at a meeting of the shareholders, held on the 3d April, 1849, a call of eight shillings per share was made; that the accounts of the mines were from time to time entered in the

cost book ; that by an account, laid before the shareholders at a quarterly general meeting held on the 5th June, 1850, the assets of the company appeared to be 950*l.* 13*s.* 1*d.*, and the liabilities 2101*l.* 3*s.* 11*d.*; that at this meeting a call of ten shillings per share was made ; that on the 8th January, 1851, another call of five shillings per share was made ; that J. Fenn received the report of the meeting of the 5th June, 1850, with the account referred to, and also the report of the meeting of the 8th January, 1851, and that he paid both calls ; that a special general meeting of the shareholders was appointed to be held on the 26th August, 1851, and a printed circular was sent to Mr. Fenn, dated the 9th August, 1851, which, after stating the intention to hold the meeting, mentioned the following (among others) as the subjects which would be submitted to the consideration of the shareholders ; namely, "To determine what course shall be adopted to discharge the present liabilities of the company, and to raise sufficient capital for working the mine vigorously, either by issuing new shares, making a call, or by any other means that may appear to the shareholders most desirable. But should the shareholders determine not to raise more money than will be sufficient to pay off all the present liabilities, then to take into consideration the best plan of closing the operations of the company, so as to prevent further expenses being incurred ;" that this meeting was

held on the 26th August, 1851, and was then adjourned to * 288 the 5th September, 1851, and notice of * the adjourned meeting was given to J. Fenn ; that J. Fenn attended no meeting of the shareholders, excepting one which he attended by his solicitor on the 3d April, 1849 ; that on the 4th September, 1851, the day before the adjourned meeting, J. Fenn sent to the purser of the company an abandonment of his shares, being a printed form (which J. Fenn had received from the office of the company) filled up in writing and signed by him and witnessed, and addressed to the purser, in the following terms : " Sir, I beg to inform you it is my desire to retire from the Pennant and Craigwen Consolidated Lead Mining Company, and I hereby relinquish all right and title to the parts or shares standing in my name in the cost book of this company ;" that on the 8th September, 1851, the purser returned to J. Fenn the last-mentioned document, and sent him another form which he said must be filled up, witnessed, and returned, before the relinquishment could be accepted ;

that the form sent by the purser was as follows: "I do hereby give you notice that it is my intention to relinquish my shares in the Pennant and Craigwen Consolidated Lead Mining Company, bearing my share of the liabilities incurred to the end of the present month;" that on the 11th September, 1851, J. Fenn returned to the purser the document first sent, and refused to sign the new one; that the purser, on the 12th September, 1851, wrote in reply to J. Fenn, saying that the directors having thought it advisable to have another form for shareholders to fill up wishing to relinquish their shares, he could not accept J. Fenn's relinquishment except upon the form sent on the 8th September, and that the one sent by J. Fenn was invalid, and could not be accepted; that on the 4th September, 1851, the debts and liabilities of the company amounted to 1730*l.* or thereabouts, being for rent of the mines under the leases and moneys due to miners and other creditors; that these debts and liabilities were still subsisting * and undischarged at the date of the order, which was * 289 not long after obtained, for winding up the company.

The name of J. Fenn was placed by the official manager on the list of contributories, and it was retained there by Master TINNEY. From the decision of the Master, J. Fenn appealed to Vice-Chancellor STUART, who on the 22d November, 1852, directed J. Fenn's name to be removed from the list. (a)

The official manager then appealed to the Lords Justices, who, being of opinion that all the facts were not then before the Court, made an order on the 18th December, 1852, discharging the order of the Vice-Chancellor, and reversing the decision of the Master, without prejudice to any question, with liberty for either party to go before the Master *de novo*, reserving the question of costs, and with liberty to apply.

In consequence of this order, a statement of facts was laid before the Master, and, so far as above stated, was agreed upon between the parties; and the Master, having had the matter argued before him, came to a decision on the 16th June, 1853, and again placed the name of J. Fenn on the list of contributories, with an observation that he was liable only in respect of debts and liabilities existing on the 4th September, 1851. (b)

(a) 1 Sm. & G. 26.

(b) The reasons of Master TINNEY for his decision, and which he wrote on

* 290 * The Master gave a certificate of this decision on the 5th July, 1853, and from it J. Fenn appealed to the Lords Justices.

The case was argued before their Lordships on the 28th July, 1853, when they directed the name of J. Fenn to be removed from the list of contributories, and gave J. Fenn his costs of the appeal and in the Court below and before the Master.

* 291 On the 27th January, 1854, the official manager * applied to the Lords Justices, (a) that the appeal of J. Fenn might be reheard before the Lord Chancellor, with or without such assistance as his Lordship might be pleased to direct; and the Lords

the back of the official manager's statement placed on the file of proceedings in his office, were as follows:—

“16th June, 1853. Subject to the completion of the evidence, as required in the margin, I am of opinion that Mr. Fenn should be settled on the list of contributories, with an observation that he is only liable in respect of debts or liabilities existing on the 4th of September, 1851. I do not find any authority for holding that in a company of the nature of the present company, a party relinquishing his shares is released, as between himself and his co-adventurers, from liabilities which he had come under in the absence of a special provision to that effect. The passage in Mr. Collier's ‘Treatise on the Law relating to Mines,’ pp. 93 and 94, shows that in respect of mines carried on on the cost book principle, a simple notice of relinquishment is not sufficient for such purpose. The superadded term of ‘settling his account with the mine,’ I think must mean an ascertainment and discharge of the adventurer's share of what is due from the whole concern. The prospectus, in this case, seems to me to refer to the cost book principle as intended to be carried out by the 24th rule, and, therefore, as furnishing or aiding the true construction of the rule. I think such ascertainment and discharge is necessary to give complete effect to the relinquishment, but not to suspend its operation with respect to subsequent transactions. The observation of C. J. WILDE in *Ricketts v. Bennett* (4 C. B. Rep. 686), approving of Mr. Crowder's statement to the effect that the directors cannot pledge the credit of individual adventurers, must, I think, be taken with qualifications, and cannot be applied to this case, as here there was at least a debt due to the landlord for which all the adventurers were liable, independent of Mr. Fenn's acquiescence in the mode in which the mine had been worked. I propose to settle Mr. Fenn on the list as a contributory liable up to the 4th of September, 1851, when the evidence shall have been made complete, and that evidence will be the ground of my decision. A special report, embodying the within statement, and to be brought before the Court by the official manager, would, I think, be an unnecessarily circuitous and expensive process. W. H. T.”

(a) The application was, in the first instance, made to the Lord Chancellor, but his Lordship refused to entertain it, intimating, however, that it might be made to the Lords Justices.

Justices, with the sanction of the Lord Chancellor, and upon the official manager depositing with the registrar, out of his own moneys, 75*l.*, to answer such costs, if any, as their Lordships should think fit to award, directed the appeal to be set down to be reheard before the full Court; and it now came on to be heard accordingly.

Mr. Selwyn, for J. Fenn. — He contended that Mr. Fenn was completely discharged from all liability under the terms of the twenty-fourth rule, and cited *Ricketts v. Bennett*. (a) He relied on *Sutton's Case*, (b) referring also to *Croxton's Case* (c) and *Cape's Executor's Case*. (d)

Mr. Malins and *Mr. Roxburgh*, for the official manager. — They insisted that Mr. Fenn could not, by the letter he had sent, get rid of his liability to existing debts: he had engaged in a trading concern, and, according to the general principle, was liable for all debts incurred in conducting the business, *Hawken v. Bourne*: (e) the circumstance that the mine was to be conducted on what was termed the cost book principle made no difference; it meant merely a partnership at will, with liberty for any * partner to go out on notice, having previously settled with * 292 his copartners in respect of his liabilities (see Wordsworth on Mines, p. 197, &c. (6th ed.), as to transfers in cost book mines), and the rules of this association were to be interpreted by reference to this principle. They submitted that *Sutton's Case* (b) did not govern the present, referring also in their argument to *In re The German Mining Company*; (g) *Burmester v. Norris*; (h) *In re St. James's Club*; (i) *Bright v. Hutton*; (k) *Northey v. Johnson*; (l) and to Collyer on Mines, p. 93.

Without calling for a reply, —

THE LORD CHANCELLOR. — I am clearly of opinion that the Master was wrong in supposing that Mr. Fenn is liable for any

(a) 4 C. B. Rep. 686.

(b) 3 De G. & S. 262.

(c) 1 De G., M. & G. 600.

(d) 2 De G., M. & G. 562.

(e) 8 M. & W. 703.

(g) 17 Jur. 745.

(h) 6 Exch. 796.

(i) 2 De G., M. & G. 383.

(k) 3 H. L. Cas. 341.

(l) Before the Q. B., May 8, 1852.

thing at all in respect of the debts of this company ; that is, that he was wrong in putting Mr. Fenn's name on the list of contributors. It is stating a very elementary principle to say, that in the case of an ordinary partnership, if there be no stipulation to the contrary, any one of the partners may retire, and, on his so retiring, his rights are, to have an account taken of all transactions down to that time, to take his share of the profits, and to pay his share of the liabilities. This principle applies equally, whether the partnership consists of two or three, or of two or three hundred. The growth, however, of partnerships consisting

of a large number of persons has led to great modifications
 * 293 of the law, partly by custom, and partly by * statute, and among such partnerships there is one adopted almost exclusively for the purpose of working mines ; I mean a partnership conducted on the cost book principle. Whatever that principle may be, its existence is clearly recognized in the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110), the sixty-third section of which enacts that the provisions of the Act shall not extend to partnerships conducted on the cost book principle.

The mine in the present case was worked on that principle, and Mr. Fenn was a holder of shares. On the 4th September, 1851, however, he gave notice that he resigned all his shares, and retired from the concern. In an ordinary partnership, he would thus have become entitled to have had an account taken of all transactions down to that time, and if the account was in his favour, he would have been entitled to receive the balance ; or if it was against him, he would have been bound to pay the balance that was due from him. The question is, whether this was the position in which he stood with reference to this mine : it undoubtedly was, except so far as it was altered by special contract. That alteration depends on the twenty-fourth rule, which provides, — [His Lordship read the rule, as before set out.] It has been said in argument that the rule means, that, on giving his notice to resign, Mr. Fenn ceased to be entitled to any profits made after that time, and was bound to pay all liabilities down to that time ; and the question is, whether this is the true construction of the rule. There is no doubt that parties might stipulate to the effect contended for, and that they might also stipulate that the accounts should be kept so as to let the partners at any time retire, cancelling all claims to further profits, and being absolved from all lia-

bilities down to that time. Such might be the contract; but the question is, whether this is the true interpretation of the rule referred to. I do not think *there can be any doubt * 294 on the subject, when the rule is read in connection with the prospectus, in which is contained this passage: "Under the cost book principle, shareholders have the right of determining their responsibility by giving notice of their intention to relinquish their shares, and on forfeiture of all previous payments."

I asked during the argument whether it was meant to be said that Mr. Fenn was entitled to all profits down to the time when he gave notice; this would be the necessary corollary of the proposition that he was liable to all engagements then incurred; for it would indeed be an extraordinary engagement that the partner, on giving up his shares, should be liable for all contracts which down to that time had resulted in a loss, but should not be interested in those which had resulted in a gain. In answer to my question it was said that Mr. Fenn would be entitled to all benefits down to the time of his notice just as he would be liable to all engagements. The point, however, is, whether this can be so, having reference to the provisions of the twenty-fourth rule, which provides, that, on depositing his shares, the shareholder is to give up all claims and demands in respect of those shares. This stipulation is quite just, according to the view which I take of the rule; for, reading it with the commentary given by the prospectus, and which is held out as an inducement to parties to enter into the speculation, I think it impossible to doubt that the construction put upon it originally, when the case was before the Lords Justices, was correct. I think too that, as was suggested by the Lord Justice KNIGHT BRUCE, Mr. Fenn might have released himself from all liability by selling to any third party, and that his partners could not have objected to his taking that course; then the object of the twenty-fourth rule is to enable *the partner, * 295 by a surrender, to do *per directum* that which he could otherwise have done *per obliquum*. Without, therefore, saying what would be the case with mines carried on under different rules, I think that, in this mine, on this prospectus, and on these rules, Mr. Fenn had a right to give the notice he did give, and that he thereby absolved himself from all liability, past and future.

THE LORD JUSTICE KNIGHT BRUCE. — This mine was represented

to have been one worked upon the "cost book principle." That is a term which I am not aware that it is my judicial duty to understand in the absence of evidence ; and the evidence now before the Court does not enable me to understand it. The association (it is said), if not formed upon "the cost book principle," is illegal. If that is the case, Mr. Fenn is not a contributory. But if the association be a legal one, and formed on "the cost book principle," I know nothing of the cost book principle except what appears in the document before me, professing to contain the terms and stipulations upon which certain persons forming this association became connected together for the purpose of working mines. One of these stipulations is the twenty-fourth. The whole question seems to turn upon the meaning and effect of that particular portion of the contract. I am not aware that the general law or any particular custom affects the dispute. I have to construe this express stipulation, and I cannot construe it otherwise than as importing an undertaking that a person relinquishing all interest in the concern, is, as between himself and his fellow undertakers, to be exempt from all past and future liability, provided only that he have fulfilled the conditions under which he is placed ; a state of

circumstances noticed by Lord St. LEONARDS in *Croxton's*
 * 296 * *Case*, where a question was raised, similar to that in *Sutton's Case*, as to the liability of a shareholder who had sold his shares in respect of antecedent debts. A distinction was there drawn which I think applies to this particular contract. Many questions of possible complexity and difficulty have been suggested ; among others, that of all the members simultaneously abandoning the association. In such a case perhaps each would be liable to indemnify the rest, so that the liability might fall equally on all. So if two or three retired at the same time. Cases have also been put of fraudulent resignations ; but fraud must of course constitute an exception. So also as to an abandonment after the undertaking having come substantially to an end. In such instances the twenty-fourth rule would perhaps have no application. The most plausible argument is, that Mr. Fenn retired after the undertaking was substantially at an end, and I was for a time impressed with that argument, but I think that there are not sufficient grounds for it. Pending an adjournment of the meeting, it was possible that resolutions might be adopted for continuing to work the mine ; and I cannot say that Mr. Fenn must be held to have foreseen

what did actually take place, or that the mine would not proceed. Not being affected with fraud, he has left behind him shareholders who might have abandoned the undertaking and did not; and I think him entitled to the benefit of the twenty-fourth rule.

THE LORD JUSTICE TURNER.—This case was ordered to be reheard upon the ground that it involved an important question upon the effect of the cost book principle. I think that it involves no such question. The sole question before us is, what is the true meaning and construction of the twenty-fourth clause of the articles of partnership? It is thus, — [His Lordship * read * 297 it.] I quite concur with the Lord Chancellor and the Lord Justice as to the meaning to be put upon that clause. The question is, whether the liability is to be determined altogether or thenceforth only. I am clearly of opinion that the meaning is, that it should be determined altogether; because the determination of the liability is correlative to the abandonment of all claims upon the company. The retiring member gives up all claims upon the company, and I think that he is freed from all liability. If there had been any doubt upon the rules, the prospectus would remove it.

* **FORBES v. LIMOND.**

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1854. March 8, 15, 18, 25. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A creditor cannot be said in any sense to have acceded to the provisions of a composition deed, unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed.

By a composition deed for winding up, under an inspector, the affairs of a partnership in Calcutta, it was, among other things, provided, that four members of the partnership should collect and pay the assets into the hands of the inspector, to be applied by him, after payment of costs, in payment among the several creditors of the partnership who should have become parties to, and have executed or otherwise acceded to, the terms of the deed; but if a commission of bankruptcy or an adjudication of insolvency should be awarded, issued, or prosecuted against the partnership, or any of them, in respect of their then debts or liabilities, before any release should be executed, the deed should thenceforth be absolutely void. The plaintiffs, who were in-

dorsees of two bills of exchange drawn by the partnership, remitted the bills from London to their agents in Calcutta, who in April, 1848, forwarded them "to the trustees" of the partnership to be registered. The partners, acting under liquidation, acknowledged the receipt of the bills, and with respect to one of them wrote — "We have registered the claim you make on our estate;" and with respect to the other — "We have duly noted the claim," returning the bills, which were transmitted back to the plaintiffs in London. In February, 1849, the inspector advertised a dividend of 10*l.* per cent, which was shortly afterwards paid on several of the debts of the creditors who had executed the deed. In March, 1849, four members of the partnership were, on their own petition in India, adjudicated insolvent, and thereupon the inspector handed over to their official assignee the balance remaining in his hands. The plaintiffs having received dividends on the bills under the insolvency in India, and from other parties in England liable upon the bills, in 1851 instituted this suit against the inspector for the payment of the 10*l.* per cent dividend advertised by him: *Held*, that the plaintiffs, not being precluded from suing any of the parties liable upon the bills, could not be considered to have acceded to the composition deed.¹

THIS was an appeal by the plaintiffs from a decree of the Vice-Chancellor STUART, who on 25th November, 1853, dismissed their bill with costs. The bill was filed on the 28d April, 1851, against William Limond, by Charles Forbes, W. H. Leith, James Nicholson, and Thomas Fox, on behalf of themselves and all other the creditors of Messrs. Lyall, Matheson, & Co., who had executed or otherwise acceded to the terms of the deed of inspection in the bill mentioned, but had not received any dividends on their respective debts, and who should come in and contribute to the expenses of the suit. The bill stated that, in 1847, William Lyall and seven other persons, who carried on business in Calcutta

* 299 under * the firm of Lyall, Matheson, & Co., suspended payment; and that in December, 1847, at a meeting of creditors, it was resolved that the firm should wind up its affairs under inspection; and that a deed for that purpose was accordingly prepared and executed or acceded to by a large majority of the creditors.

The deed bore date 1st January, 1848; the firm of Lyall, Matheson, & Co. being parties of the first part, the defendant W. Limond, as inspector, of the second part, and the creditors of the third part; and after reciting that the creditors had resolved that it would be for the benefit of all parties interested that the affairs

¹ See 1 Lead. Cas. Eq. (8d Am. ed.) [212, 213], 307.

should be wound up under inspection, and that W. Limond should act as inspector at a monthly salary of 500 rupees, and that he had agreed to accept the office as he had testified by signing and being a party to the deed, witnessed that the parties of the third part granted the usual licenses to the firm to manage, collect, and get in the estate, credits, &c., of the copartnership under the inspection and control, and subject to the directions and instructions of W. Limond, from the date of the indenture until the 31st December, 1848. The copartnership covenanted, as soon as practicable, to draw out and state a just and true account of all their property, goods, chattels, &c., and deliver the same to W. Limond, and to receive all moneys due to the copartnership, and pay the same to W. Limond, or into such bank as he should direct or appoint, "to be by the said W. Limond, or by the inspector for the time being, from time to time paid and applied in the first place in and towards defraying the costs, charges, and expenses and other payments necessary for the carrying on and winding up the copartnership affairs, and therein particularly mentioned; and from and immediately after full payment and satisfaction of all such costs, charges, expenses, and payments, or after providing for the due payment and satisfaction thereof, to pay and * distribute the residue remain- * 300 ing after such payment and satisfaction, or after providing for such payment and satisfaction as aforesaid, unto and among the several creditors of the parties thereto of the first part who should have become parties to and should have executed the now stating indenture, or should have otherwise acceded to the terms thereof, their respective executors, administrators, or assigns, ratably and proportionably, according to the amount of their respective claims and demands upon the said copartnership, until the whole thereof, or so much and so far as the said moneys should extend to pay the whole thereof, should be liquidated, such payment and distribution to be from time to time made by the said W. Limond, or by the inspector for the time being, as often as the sum in hand, which should not for the time being be required for defraying the costs and expenses and for managing or carrying on any of the factories or other property of the said copartnership, should be sufficient to pay a dividend of 5l. per cent on the amount of the said respective debts:" and it was also agreed "that it should be lawful for all or any of the creditors parties thereto to execute the indenture, without prejudice to any mortgage, lien, or charge, &c.:

and it was provided, that if the said W. Limond, or the inspector thereunder for the time being, should certify in writing that the parties thereto of the first part had made default in the performance or observance of the or any of the covenants, clauses, or stipulations therein contained on their parts to be performed and observed; or if a commission of bankruptcy or an adjudication of insolvency should be awarded, issued, or prosecuted against the said parties thereto of the first part, or any of them, in respect of their then copartnership debts or liabilities, before any release should be executed as therein was provided, then and in any of the said cases

the now stating indenture, and the license and liberty
 * 301 thereby * granted, and every other clause, covenant, matter, and thing therein contained, should cease and determine, and be thenceforth absolutely void, any thing thereinbefore contained to the contrary notwithstanding: and the said W. Limond did thereby covenant and agree with and to the parties to the now stating indenture of the third part, and with and to each of them, and with and to their and each of their executors, administrators, and assigns, that he the said W. Limond, so long as he should continue to act thereunder, should and would from time to time, as often as the money in hand should amount to a sufficient sum over what should be necessary to retain for carrying on the said copartnership estate (unless prevented by legal or other duly constituted authority), make a dividend of all the surplus money which should have been received and which should be applicable to the payment of a dividend unto and amongst all the said parties of the third part, as such creditors as aforesaid, ratably and in the proportions aforesaid; and that the money which should from time to time be received on account of the copartnership estate, and all bills and securities for money due or belonging to the trust estate, should be deposited in the name of him W. Limond, as such inspector as aforesaid, with the Bank of Bengal, or with such bank or person or persons as a majority in value of the creditors, parties thereto of the third part, should for that purpose by writing direct or appoint." The deed also contained the usual clause on the part of the creditors indemnifying Mr. Limond, or the inspector for the time being, in respect of any loss in the carrying on of the business, in proportion to the amount of their respective debts.

The bill stated that the plaintiffs were, at and prior to the date of the deed of inspection, and continued to be, the in-

dorsees for value of two dishonoured bills of * exchange, * 302 one for 2000*l.*, and the other for 1633*l.* 8*s.* 9*d.*, drawn by Messrs. Lyall, Matheson, & Co., and accepted by Messrs. Lyall, Brothers, & Co., of London ; that, on being advised of the execution of the deed of inspection, they transmitted the two bills of exchange to their correspondents in Calcutta, in order to become entitled to the benefits of the said deed ; and that the bills were accordingly sent by the plaintiffs' correspondents to Messrs. Lyall, Matheson, & Co., at Calcutta, and were admitted by them as debts, in respect whereof the plaintiffs were entitled to the benefits of the deed.

The bill then set out the following correspondence between the plaintiffs' agents in Calcutta and the trustees of Messrs. Lyall, Matheson, & Co. : " To the Trustees of Messrs. Lyall, Matheson, & Co. Calcutta, 18th April, 1848. Dear Sirs, — We enclose Messrs. Lyall, Matheson, & Co.'s bill, No. 18/1003, dated 1st May, 1847, 10^m/ date, on Messrs. Lyall, Brothers, & Co. for 2000*l.*, with protest for non-payment, together with a memorandum of our claim, amounting to Company's rupees 23,444 : 7 : 9, which please register, returning the bill and protest to us per bearer, for transmission to London. We are, dear Sirs, yours faithfully, MACINTYRE & Co." The following answer was returned to that letter : " Calcutta, 22d April, 1848. Messrs. Macintyre & Co. Dear Sirs, — We are to-day in receipt of your note of 18th inst., giving cover to our draft, No. 18/1003, on Lyall, Brothers, & Co. for 2000*l.*, with protest of its dishonour. We have registered the claim you make on our estate in respect thereto, and beg now to return, as you request, both the bill and protest. Yours faithfully, LYALL, MATHESON, & Co., in liquidation." The other bill was transmitted through different agents, and in the following letter : " Calcutta, 6th June, 1848. To the Trustees of Messrs. Lyall, Matheson, & Co. Dear Sirs, — We enclose Messrs. Lyall, Matheson, & Co.'s bill, No. 18/1063, dated 8th June, 1847, @ 10^m/ date, on * Messrs. Lyall, Brothers, & Co. for 1633*l.* * 303 8*s.* 9*d.*, with protest for non-payment, together with a memorandum of our claim, amounting to Company's rupees 19,135 : 12 : 1, which please register, returning the bill and protest to us per bearer, for transmission to London. We are, dear Sirs, yours faithfully, ASHBURNER & Co."

“ Messrs. Lyall, Matheson, & Co.		Dr.
Your bill, No. 18/1063, dated 8th June, 1847, at 10 ^m / date, to order on Messrs. Lyall, Brothers, & Co., London, for 1633 <i>l</i> . 8 <i>s</i> . 9 <i>d</i> ., at 1/8½ pre.		
C. Rs.	19,123	2 9
Protesting charges for non-payment, 1 <i>l</i> . 1 <i>s</i> . 6 <i>d</i> ., at 1/8½ pre.		
	12	9 4
“ Calcutta, June 5, 1848.”	C. Rs.	<u>19,135 12 1</u>

In answer to which Messrs. Lyall, Matheson, & Co. wrote as follows: “ Calcutta, June 6, 1848. Messrs. Ashburner & Co. Dear Sirs,— We are in receipt of your letter of yesterday’s date, enclosing your draft, No. 18/1063, on Lyall, Brothers, & Co., London, for 1633*l*. 8*s*. 9*d*., with protest of its non-payment. We have duly noted the claim of rupees 19,135 : 12 : 1, as per statement which you make in respect to this bill, and now beg to return both the bill and protest herewith. We remain, dear Sirs, yours faithfully, LYALL, MATHESON, & Co., in liquidation.”

The bill then alleged that Messrs. Lyall, Matheson, & Co., acting under the orders and with the privity of the defendant W. Limond, entered the name of the plaintiffs’ firm in respect of the said debts among the creditors who were entitled to the benefit of the deed, and had acceded to the terms thereof, the period for the continuance of the license having been previously renewed and extended. The bill then stated, that in the month of February, 1849, W. Limond, having in his hands a clear surplus

* 304 * arising out of the moneys paid to and received by him as such inspector as aforesaid, for and on account of the estate, property, and effects of Messrs. Lyall, Matheson, & Co., and applicable to the payment of dividends, declared a dividend of 10*l*. per cent on the debts of the creditors of the firm of Lyall, Matheson, & Co., who had executed or otherwise acceded to the terms of the deed of inspection; and the debt so due and owing to the plaintiffs from Messrs. Lyall, Matheson, & Co. in respect of the bills for 2000*l*. and 1633*l*. 8*s*. 9*d*., and so admitted and entered as aforesaid, was included amongst the debts upon which the dividend was so declared by W. Limond; and that soon after such declaration of dividend was made by W. Limond, he paid to a great part of the creditors of Messrs. Lyall, Matheson, & Co., who

had executed or otherwise acceded to the terms of the said deed of inspection, out of the surplus moneys in his hands applicable to the payment of the said dividend, the amounts due and payable to them respectively on their respective debts on account of such dividend, and he retained the residue of the said moneys as trustee for the plaintiffs and the other unsatisfied creditors of Messrs. Lyall, Matheson, & Co. who had executed or otherwise acceded to the terms of the said deed, and for the purpose of the same being applied in and towards payment of the amount due to the plaintiffs on their bills in respect of the dividend, and to the other creditors of Messrs. Lyall, Matheson, & Co. on their respective debts.

The bill alleged that the plaintiffs had frequently, through their correspondents and agents, applied to the defendant W. Limond to pay them the amount due on the said bills in respect of the dividend of 10%. per cent, but that he had refused, and justified such refusal on the pretence that some of the partners of the firm of Lyall, Matheson, & Co. had recently taken the benefit of the * Insolvent Debtors' Act in India, and that he had paid * 305 over the moneys applicable and appropriated to the said dividend of 10%. per cent for the plaintiffs and the other unsatisfied creditors of Messrs. Lyall, Matheson, & Co. to the official assignee of the Insolvent Court; and the plaintiffs charged that he ought to have paid the same to the plaintiffs and the other unsatisfied creditors, and submitted that such payment was in breach of his duty as inspector and trustee, and that he was personally liable and ought to make good the same; and, after charging that there was no more moneys or property in the hands of the defendant W. Limond, and that there had been no commission of bankruptcy or adjudication of insolvency within the meaning of the deed of inspection in respect of their copartnership debts, and that the deed of inspection was at the time the dividend of 10%. per cent was declared, and at the filing of the bill, valid and subsisting, prayed a declaration that the plaintiffs and the other unsatisfied creditors of the said Messrs. Lyall, Matheson, & Co. were entitled to have the moneys so received and retained by W. Limond, and applicable to and appropriated by him in payment of the dividend of 10%. per cent, applied in and towards payment of their respective debts, so far as such dividend would extend; and that, if necessary, an account might be taken of the moneys so received and retained by W. Limond; and that an account might also be

taken of what was due and owing to the plaintiffs and the other creditors of Messrs. Lyall, Matheson, & Co. in respect of their debts, and that the moneys so received and retained by W. Limond, and applicable to the payment of such dividend aforesaid, might be applied in and towards the payment to the plaintiffs and the other creditors of a dividend at the rate aforesaid on their respective debts, or otherwise ratably and proportionably on such debts

as the Court should direct; and that if the defendant W.

* 306 Limond should allege or * pretend that he had paid the moneys so received and retained by him as aforesaid to such official assignee as aforesaid, or to any other person or persons, then that he might be declared to be personally liable and accountable for and ordered to make good and pay the same; and that the same, when paid, might be applied in and towards payment of the debts due and owing to the plaintiffs and the other creditors of Messrs. Lyall, Matheson, & Co., and that W. Limond might be ordered to pay the costs of the suit.

The defendant W. Limond by his answer stated that the majority of the creditors executed the indenture in February, 1849, being the time of the payment of the dividend under the same, and that no creditor received any dividend until he had executed the indenture, it not being deemed that any other act was an accession; that the two bills were noted as claims merely, but that the plaintiffs were in no way recognized in connection with the claims in respect of such bills, the same being preferred by the agents on behalf of their constituents in London, whose names were never mentioned; that the bills were registered as vouchers, in respect of which claims would or might have to be satisfied when the whole amount of such liabilities was ascertained, and to that extent, and no further or otherwise, the bills were admitted by Messrs. Lyall, Matheson, & Co. as debts in respect whereof the holders would be entitled to the benefit of the deed on their accession thereto; but the defendant denied that the fact of such claims having been registered was any acceding by the holders of the bills to the provisions of the deed, or that in any case such registering was so considered, and he added that if Messrs. Macintyre & Co. and Messrs. Ashburner & Co., who were the parties holding the bills,

and were cognizant of all proceedings connected with the

* 307 liquidation of the * estate, had applied for the dividend, and had executed the deed, it would have been paid to them.

The defendant expressed his belief that no entry of the name of the plaintiffs' firm, as creditors in reference to the said bills or either of them, had been made by Messrs. Lyall, Matheson, & Co. in any book or document; and he said that no such entry was made by them acting under his orders, or with his knowledge or privity. The defendant admitted that he had declared the dividend of 10% per cent on the debts of the creditors of the firm of Lyall, Matheson, & Co., who had executed or should execute the deed. He stated his belief that the debt alleged to be due to the plaintiffs in respect of the two bills for 2000% and 1633% 8s. 9d. was not included among the debts upon which the dividend was declared by the defendant, and that no list nor statement was prepared in which the claim of the plaintiffs was included. The defendant stated that at the time of the declaration of insolvency there were in the Bank of Bengal between 2000 and 3000 rupees, which balance was claimed by and paid to the official assignee, together with all other securities belonging to the firm of Messrs. Lyall, Matheson, & Co. The defendant denied that the plaintiffs had acceded to the terms of the deed of inspection, or that the plaintiffs or their agents had ever made or caused to be made the applications and requests in the bill alleged; and that the only application which was ever made by or on behalf of the plaintiffs was on the 30th January, 1851, by their solicitor requesting payment of the dividend of 10% per cent on the plaintiffs' alleged registered debt in respect of the two bills. The defendant said that an adjudication of insolvency, within the meaning of the deed of inspection, had been issued and prosecuted against Messrs. Lyall, Matheson, & Co., and that the members of the firm had long since received their * final discharge; and that, * 308 though the deed of inspection was valid at the time the dividend of 10% per cent was declared, yet that every power contained in the deed ceased on the adjudication of insolvency, and that the same was not now valid with respect to what was done thereunder previously to such adjudication.

The plaintiffs filed their replication in April, 1852, and subsequently, from time to time, obtained orders to enlarge publication to prove the bills. The defendant was himself examined in chief, and swore that he never heard of the claim of Messrs. Forbes & Co. until shortly before the filing of the bill; that no creditor of Messrs. Lyall, Matheson, & Co. received any dividend until he

had executed the deed of inspection; that no creditors were treated by him, or by Messrs. Lyall, Matheson, & Co., as entitled to the benefits of the deed, or as having acceded thereto, other than the creditors who had actually executed the deed; and that no part of the assets of Messrs. Lyall, Matheson, & Co. was retained for the purpose of being applied to the payment of any dividend to the plaintiffs, or in respect of the bills of exchange; and that no debt to the plaintiffs was ever, to his knowledge and belief, registered against the firm of Lyall, Matheson, & Co., nor were the plaintiffs, or was any or either of them, admitted or acknowledged in any way by the firm of Lyall, Matheson, & Co. as creditors who were entitled to the benefit of the deed, or as parties acceding thereto, nor did they, to his knowledge, information, or belief, ever accede thereto.

In May, 1849, two months after the adjudication of insolvency, the following correspondence took place at Calcutta, between a gentleman, writing on behalf of * the plaintiffs, and one of the members of the partnership:—

“ To J. Lyall, Esq.

“ My dear Lyall, — Please say if you have retained the dividend of 10%. per cent on Forbes, Forbes & Co.’s registered claims on your estate. If so, can you say at foot where the money is, and in whose names, as I am writing to our friends to-day ?

“ Yours, &c., C. MORGAN.”

In answer to this application Mr. Lyall wrote:—

“ My dear Morgan, — The whole of the existing assets are with the official assignee, with whom their distribution rests. I am sorry you did not apply prior to the estate going into Court. Had you done so, you would have received your 10%. per cent in common with the other creditors. Yours, &c.,

“ J. LYALL.”

“ Calcutta, May 10, 1849.”

It appeared by the indorsements upon the bills of exchange, under the official stamp of the Court in India, that proofs had been made in respect of each of the bills, on behalf of Messrs. Forbes & Co., against the estate of Messrs. Lyall, Matheson, & Co. ;

and a dividend had also been received upon each of them from other parties liable on the bills more than a year previously to the institution of this suit.

There was no distinct evidence that the plaintiffs' firm was the same firm as that whose name appeared on the bills as indorsees; and in the course of the argument it was objected, that the cause having been at issue before July, 1852, it was not competent for the plaintiffs to prove, by affidavit filed after publication, that they were the principals transmitting the bills to their agents * in Calcutta; but the Court intimated that if it was essen- * 310 tial to the plaintiffs' case an inquiry might be directed, or that the plaintiffs might be examined on that head.

The Solicitor-General, Mr. Lewis, and Mr. Willes, for the plaintiffs, in support of the appeal. — The bills having been forwarded to the trustees of Messrs. Lyall, Matheson, & Co., who were then acting as the agents of the defendant, and having been acknowledged by them as valid claims upon their estate, ought to have been paid *pari passu* with the other admitted claims. By the deed of inspectorship the defendant, in consideration of a large salary, bound himself to superintend and control the winding-up of the estate; and having declared a dividend of 10% per cent on the debts which had been admitted, he became thereby a trustee for the plaintiffs to the extent of one-tenth of their claims. The only event in which the defendant could have been relieved from this obligation would have been by an adjudication of bankruptcy *in invitum* against Messrs. Lyall, Matheson, & Co., but we submit that an order made upon a voluntary petition, at the instance of the debtors, is not an adjudication of bankruptcy within the provision in the deed of inspectorship. And this view is supported by reference to the 6th, 7th, 8th, 10th, 30th, 31st, and 37th sections of the Act 9 Geo. 4, c. 73, which provides for the relief of insolvent debtors in India. It is clear, however, that whether the order of the Court in India amounted to an adjudication or not, it cannot have a retrospective operation so as to affect the moneys which had theretofore been ascertained and appropriated to the liquidation of all approved debts.

[THE LORD JUSTICE TURNER. — Assuming this not to have been an insolvency within the meaning of the trust deed, would not the

official assignee be a trustee for the plaintiffs? And, under such circumstances, can the plaintiffs sue the defendant * 311 * alone without bringing before the Court the parties into whose hands the moneys have come?]

We submit that an accountable party cannot escape from his liability by paying over the trust moneys to a third party. It may be contended that there was not such an accession by the plaintiffs as was contemplated by the deed, but it has been the habit of Courts of Equity, as well as of Courts of Law, to construe liberally such provisions. *Spottiswoode v. Stockdale*; (a) *Jolly v. Wallis*; (b) *Ex parte Shaw*; (c) *Harland v. Binks*; (d) *Field v. Lord Donoughmore*. (e) In the present case the Vice-Chancellor has miscarried, in so far as he has grounded his decision upon the fact, viz., that the plaintiffs have received dividends under the insolvency, and thereby condoned the breach of trust; but this fact, being neither averred nor relied upon by the defendant, ought not to have formed an element in the decision, nor even if it had been alleged would it be a bar to the relief prayed, as, if the plaintiffs had received the 10l. per cent from the defendant, they would not have been precluded from proving for the difference. The admission in the answer, that if the agents had applied for the dividends and executed the deed they would have received the dividend, is pregnant with an acknowledgment of the validity of our claim.

Mr. W. M. James and *Mr. Hemming*, for the defendant, in support of the Vice-Chancellor's decree. — There is not a particle of evidence to prove that the defendant knew that the plaintiffs were the holders of the bills at the time when the claim upon the bills was registered; on the contrary, the defendant swears that * 312 he did not know that to be the case. The persons who * are now alleged to have been only the agents for the plaintiffs, must be assumed at least to have been intrusted with the power of executing or acceding to the deed, and, on this assumption, it would have been competent to them, equally with the other creditors who had received the 10l. per cent, to have executed or acceded to the deed before the insolvency occurred. In the present

(a) Coop. 102.

(d) 15 Q. B. 713.

(b) 3 Esp. 228.

(e) 1 Dru. & War. 227.

(c) 1 Mad. 598.

instance, however, the plaintiffs can in no sense be assumed to have acceded by themselves or their agents, inasmuch as not only has there been no actual execution of the trust deed by them, or by any one on their behalf, but there has been no constructive execution from which any obligation can be said to have attached to the plaintiffs to be bound by the provisions of the trust deed. The plaintiffs, moreover, are estopped by their own conduct, which has been quite opposed to any thing like accession, having not only proved under the insolvency in India, but having been receiving dividends (the receipt of which they have suppressed) from all parties liable on the bills, each of whom would have had a right of action *pro tanto* against Messrs. Lyall, Matheson, & Co., and the release of the plaintiffs would, therefore, have been completely inoperative.

[*Mr. Willes* referred to the observations of Baron PARKE in *Kearsley v. Cole*, (a) to show that where there is a reserve of remedies against a surety, the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him.]

The Solicitor-General, in reply. — Assuming that the plaintiffs had received the dividends * under the insolvency, * 313 with notice that the defendant had paid over to the official assignee the 10l. per cent specifically appropriated to the discharge of the plaintiffs' bills, that would not have exonerated the defendant; and while he could, under such circumstances, have reclaimed it from the official assignee, it is clear that the plaintiffs could not.

THE LORD CHANCELLOR. — This was an appeal from an order of the Vice-Chancellor STUART dismissing the bill with costs.

The case made by the plaintiffs is, that in the course of the year 1847 they became the holders of two bills of exchange, which had been drawn by a firm in Calcutta, and accepted by their correspondents in London, payable to their own order. It appears that these bills were indorsed by several parties, until they ultimately

(a) 16 M. & W. 128; see p. 135.

came into the possession of Messrs. Forbes, Forbes, & Co., who are the present plaintiffs. They say that these bills were transmitted by them to their agents in Calcutta, with a view that they should make claims in respect of the bills on the Calcutta house, or rather on the persons who were carrying on the business of the Calcutta house in liquidation. The bills having come to the possession of the plaintiffs in 1847, it appears that towards the end of that year both the Calcutta firm, who were the drawers, and the London firm, the acceptors of the bills, fell into embarrassments; and on the 1st January, 1848, a composition deed was prepared, to which the Calcutta firm were parties of the first part, Mr. Limond the defendant of the second part, and the creditors who should execute of the third part, whereby it was arranged that the affairs of the Calcutta firm should be wound up under the superintendence of Mr. Limond, four members of the firm manag-

* 314 ing the affairs, and complying with * certain provisions named in the deed as to keeping the accounts under the superintendence of Mr. Limond, while the creditors who should execute the deed were to enter into certain covenants on their part.

The important particulars of the deed are these: It stipulated that Mr. Limond should superintend the winding-up of the concern; and the creditors who were parties agreed to give a letter of license, or, rather, the deed itself operated as a letter of license to the partners, enabling them to manage their business without fear of molestation from arrest, which was to be in force for a year, with liberty to Mr. Limond to extend it for another year, which, in fact, he did. They were to collect and pay the money belonging to the partnership into the account of Mr. Limond, or into some account over which he should have control, and the assets collected were to be applied, first, in paying the expenses of the deed and of winding up the business, and the surplus money was to be distributed among the creditors, who should execute or otherwise accede to that deed. The creditors who executed the deed agreed to accept such terms, and gave this letter of license; and they further covenanted that if loss should occur in the carrying on of the business, they would indemnify Mr. Limond in proportion to the debts in respect of which they were creditors under that deed. That deed having been executed, the plaintiffs say that they transmitted these two bills to their agents in Calcutta, in order to become enti-

bled to the benefits of the composition deed. What the agents did was this: they presented the bills to Messrs. Lyall, Matheson, & Co., who were then winding up their concerns under the superintendence of Mr. Limond. As to one of them, there was this acknowledgment by Messrs. Lyall, Matheson, & Co.: "We have registered the claim you make on our estate." As to * the other, there was no such indorsement, but there was * 315 a letter showing that they had made a note of the claim.

Now early in February, 1849, sufficient funds had been realized in the winding-up of the business of the Calcutta house to enable Mr. Limond to make a dividend of 10% per cent; and, consequently, a dividend of 10% per cent was paid to a very large number of creditors of Messrs. Lyall, Matheson, & Co., who came in and executed that deed. I ought to notice that there is a little inconsistency in the deed in this, that while the trusts are to pay the dividends to the parties who should execute or otherwise accede to the deed, the covenant by Limond is only to pay to "such creditors as aforesaid," referring to the parties of the third part, or only those who had executed the deed; but I think it clear that if a person had acceded to the deed within the meaning of the stipulation, it was Mr. Limond's duty to pay him his dividend, whether he had actually executed the deed or not.

I have not the least doubt of the propriety of those decisions, both in this Court and at law, several of which have been referred to, which show that a party may bind himself by the terms of such a deed as this, even if there had not been the words "or otherwise acceded to," without executing it. But this, I think, is perfectly certain, that no person can be considered to have impliedly acceded to a deed of this sort within the true meaning of that expression, who has not put himself in precisely the same situation with regard to the debtors as if he had executed it; the principle of the rule being that if you put yourself in the situation of having the benefit of a deed, you must bear its obligations, although you have not literally executed the deed.

* The first question that arises is, assuming the plaintiffs, * 316 Messrs. Forbes & Co., to be the holders of these bills, as it is alleged they were (and if any thing were to turn on that I should have thought an inquiry necessary), did they accede to the deed within the meaning of the stipulation? For this purpose I treat the agents to whom the bills were remitted to be the same as

Messrs. Forbes & Co. What they did was this: they went to Messrs. Lyall, Matheson, & Co., the debtors on the bills, and who were winding up the business under the superintendence of Mr. Limond, and desired them to register their claim, which was done, at least one of the bills was registered, and the other was noted as a claim; and the bills were returned to the agents with a view of being remitted back to London, because it must be observed that there were several other persons liable on the bills in England, and from whom the amount of the bills, or a part of the amount of the bills (the whole if the parties indorsing were solvent, or a portion if they were insolvent), might be recovered. Now unless that was acceding to the deed there was nothing else done that can be represented as an accession. In my opinion it was no acceding to the deed at all, for this obvious reason. Suppose that when the bills had got back to London, Messrs. Forbes & Co. had found that one of the partners of the firm in Calcutta was then in London solvent: if they had acceded to the deed, they would have been bound not to proceed against him or take him in execution. But if they had done so, and an application had been made to this Court to restrain them, it seems to me to be preposterous to say that they had done any thing which prevented them from suing any one of the persons liable on the bills who happened to be solvent. Again, if there had been no dividend under the insolvency in India, and if the winding-up had been a failure, and Mr. Limond had become responsible, as, under certain circumstances, he

* 317 might have been, and if the * partnership in Calcutta were held to have been his agents, could it be said that the plaintiffs had bound themselves to indemnify Mr. Limond in proportion to the extent of their debts? Clearly not. Therefore it appears to me that on that ground also there was no acceding to the deed at all. But I go much further, although that is an all-sufficient ground. In my opinion, if the communication by the agents had been, "Take a note of this; register our claim, and recollect that although we, Messrs. Forbes & Co., are not in Calcutta to execute the deed, we intend to be bound by it, and hereby accede to it," that would have been quite immaterial,—because till it was communicated to Mr. Limond he had no knowledge of any thing of the sort.

It was, however, suggested that Messrs. Lyall, Matheson, & Co., in winding up the concern, were the agents of Mr. Limond. I do

not agree to that in any sense. They were persons not appointed by Mr. Limond ; but even if they were his agents, if they were persons named by him to carry on the business, that too would be immaterial, unless they were agents to receive on his behalf the notification of accession to the deed. It seems to me, that denying, as he positively does, that he knew of the existence of the plaintiffs' claims until after the suit was instituted, if there had been an acceding to the deed at all, it was not of such a kind as to make it a breach of trust to do what he was bound to do when the insolvency happened ; namely, to pay over the whole of the funds to the official assignee under the insolvency.

The Vice-Chancellor, according to the note of his judgment with which I have been furnished, seems to have thought, that, after what he held to have been an accession, the conduct of the parties under the insolvency * precluded them from seeking *318 relief in this suit. I do not enter into the consideration of that question. Whether the Vice-Chancellor proceeded exactly on the same grounds on which I should have proceeded, or on others, I think the conclusion at which he arrived was a perfectly correct conclusion ; and that, having ordered this bill to be dismissed with costs, he did what he ought to have done, and in my opinion, therefore, the present appeal ought to be dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE. — The plaintiffs' title to relief in this cause depends on the establishment by them of three propositions, not any one of which is admitted by the defendant. First, that the plaintiffs are, or were, the persons composing the firm of Forbes, Forbes, & Co. Secondly, that the firm of Forbes, Forbes, & Co. were creditors of the house of Lyall, Matheson, & Co., entitled, according to the true meaning of the deed of inspectorship executed by the members of that house when they fell into embarrassment, to accede to the deed. Thirdly, that Forbes, Forbes, & Co. in fact acceded to the deed in such time and manner, and so acted, as to entitle themselves, and did accordingly become entitled, under the deed, to a dividend of 10% per cent on their alleged debt ; and that the defendant had that dividend in his hands as a trustee of it for them. And, moreover, the plaintiffs have, in the fourth place, to meet and resist the defendant's contention, that whether the three propositions are true or untrue, the plaintiffs have so conducted themselves as to exclude them from

any right of recourse against him. But the plaintiffs have not, as I consider, made good their case as to any one of these four points.

It is, indeed, plain and clear that on the pleadings and evidence as they stand, they have not shown a title to
 * 319 * relief, and that the bill, therefore, unless the evidence can usefully and ought to be added to, fails, so that in truth, much as we have heard in argument, the only question substantially is, whether we ought, by directing an inquiry or otherwise, to allow the plaintiffs to adduce further evidence, which is a matter of discretion to be exercised judicially, with a proper regard to all the circumstances before the Court; and I think the circumstances here such as to preclude any such exercise of discretion against the defendant. In the first place, I am of opinion, that the plaintiffs might, and ought to, have stated in the bill facts which are not there stated. Secondly, if they have a case provable, they have, in my judgment, shown no reason, no apology, no excuse, for not having proved it. Thirdly, I think it neither certain nor likely that there is any evidence capable of being adduced in addition to that before us, which, with it, would show any title to relief in the plaintiffs against the defendant. And, fourthly, the money claimed in the suit having been paid away by the defendant in India, not with any intention of doing wrong, but in good faith, and in the belief that he was acting correctly; the circumstances being such as to render it impossible, or very highly improbable, that, if subjected to the plaintiffs' demand (I must say in any view a harsh demand), he will be able to recover it in any other quarter, and the house of Forbes, Forbes, & Co. (which house the plaintiffs represent themselves to be) having, if we put the most favourable construction upon their conduct, acted loosely and carelessly in the matter, they appear to me not entitled to indulgence — not entitled to any thing that is not *ex debito* — from this Court. The Vice-Chancellor having dismissed the bill with costs, I follow him willingly, by concurring with the Lord Chancellor in dismissing the appeal with costs.

* 320 * THE LORD JUSTICE TURNER. — I have little to add in this case. In order to entitle the plaintiffs to the benefit of this deed, it was incumbent upon them, at least, to prove that they had acceded to it, and, in my opinion, they have failed to do so. I see no proof whatever that Macintyre & Co. or Ashburner & Co.

were in any manner authorized to accede to the deed on the plaintiffs' behalf. It seems to me, also, that this bill is not properly framed to entitle the plaintiffs to the relief which they seek. The case put by the bill is that of a valid subsisting deed. If this was the case, justice would require that all the provisions of the deed should be executed for the benefit of all who have acceded to it; but this bill, proceeding upon an appropriation which is not proved, is filed by the plaintiffs only on behalf of themselves and the others who have not received the dividend. The case argued at the bar, that the deed was determined by the insolvency, subject to the right of the plaintiffs and other creditors to the dividend, is not even hinted at by the bill. Again, the plaintiffs have received dividends under the insolvency, with full knowledge that the funds which they now insist ought to have been applied according to the provisions of the deed, had been paid over to the assignees, who were bound by law to distribute, under the insolvency, the assets which they received; and, in the absence of any special case made by the bill, I think this course of conduct sufficient to disentitle the plaintiffs to the relief which they ask. In effect, by receiving the dividends under the insolvency, they have adopted the breach of trust, if breach of trust there was. The appeal must be dismissed with costs.

* PARKER v. SOWERBY.

* 321

1854. June 14. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testator bequeathed to his wife an annuity payable out of part of his real estate, and he devised other real estate to trustees upon trust on the youngest of his nephews and nieces coming of age to sell and to divide the proceeds among his nephews and nieces: the testator gave to the trustees an express power to lease and also a general power to manage, and to cut timber for the purpose of repairs at their discretion: *Held*, that the widow was bound to elect between the annuity and her dower.¹

Held, also, that in order to raise a case of election against the widow, it must be

¹ See 2 Story Eq. Jur. §§ 1088, 1088 a; *Bending v. Bending*, 3 K. & J. 257; 1 Jarman Wills (3d Eng. ed.), 432, 433; *Pepper v. Dixon*, 17 Sim. 200; *Padbury v. Clark*, 2 Mac. & G. 304 n. (1), 305 n. (1), 307 n. (1) and (2).

shown from the will that the husband intended to dispose of the property subject to dower in a manner inconsistent with the right to dower; and that the power to lease given to the trustees was a sufficient evidence of such intention; further, that the powers to manage and to cut timber were inconsistent with the right to dower.¹

THIS was an appeal from an order made by Vice-Chancellor KINDERSLEY, dated the 4th June, 1853, and the question raised was whether Sarah Monkhouse, the widow of the testator in the suit, was or not bound to elect between her dower and thirds out of the testator's real estate, and the benefits given to her by his will.

¹ If a testator should bequeath property to his wife, manifestly with the intent of its being in satisfaction of her dower, it would be a case for election. But such an intention must be clear and free from ambiguity. In order to exclude dower, the instrument containing the bequest ought to comprise some provision inconsistent with the claim to it. *Fuller v. Yeates*, 8 Paige, 325; *Adsit v. Adsit*, 2 John. Ch. 448; *Smith v. Knishern*, 4 John. Ch. 9; *Jones v. Powell*, 6 John. Ch. 194; *Jackson v. Churchill*, 7 Cowen, 287; *Van Orden v. Van Orden*, 10 John. 30; *Kennedy v. Mills*, 13 Wend. 553; *Bull v. Church*, 5 Hill, 206; *Savage v. Burnham*, 17 N. Y. 562; *Dodge v. Dodge*, 31 Barb. (N. Y.) 413; *Palmer v. Voorhis*, 35 Barb. (N. Y.) 479; *Leonard v. Steele*, 4 Barb. (N. Y.) 20; *Sandford v. Jackson*, 10 Paige, 266; *Chapin v. Hill*, 1 R. I. 446; *Collins v. Carman*, 5 Md. 503; *Pickett v. Peay*, 2 Const. (S. C.) 746; *Herbert v. Wren*, 7 Cranch, 370; *Shaw v. Shaw*, 2 Dana, 342; *Baily v. Duncan*, 4 Monroe, 265, 266; 4 Kent (11th ed.), 57, 58; *Allen v. Pray*, 3 Fairf. 138; *Perkins v. Little*, 1 Greenl. 150; *Stark v. Hunton*, Saxton (N. J.), 216; 2 Story Eq. Jur. § 1088 *et seq.*; *Higginbotham v. Cornwell*, 8 Grattan, 83; *Lasher v. Lasher*, 13 Barb. 106; *Tooke v. Hardeman*, 7 Geo. 20; *Douglas v. Feay*, 1 West Va. 26. The widow is not bound to make her election until all the circumstances are known, and the condition and value of the funds are clearly ascertained. 2 Story Eq. Jur. § 1098; 4 Kent (11th ed.), 57; *United States v. Duncan*, 4 M'Lean, 99; *Hall v. Hall*, 2 M'Cord Ch. 280; *Kidney v. Coussmaker*, 12 Ves. (Sumner's ed.) 136, n. (a); *Worthington v. Wigington*, 20 Beav. 67; *Wintour v. Clifton*, 21 Beav. 447, 468; S. C. 8 De G. M. & G. 641; *Campbell v. Ingilby*, 21 Beav. 582. An election made under a mistake will not bind her. *Snelgrove v. Snelgrove*, 4 Desaus. 27; 4 Kent (11th ed.), 57. She may lose her right to elect by delay. *Blunt v. Gee*, 5 Call, 481. In some cases the intent to exclude the right to dower has been shown by matters extraneous to the will. *Baily v. Duncan*, 4 Monroe, 265, 266. In Massachusetts, unless the widow within six months after the probate of the will of her husband files in the probate office in writing her waiver of the provisions made for her in the will, she shall not be endowed of his lands, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower. Genl. Sts. c. 92, § 24. This makes a change of the rule at common law. *Reed v. Dickerman*, 12 Pick. 149; *Allen v. Pray*, 3 Fairf. 138. But a provision for

John Monkhouse, the testator, was, at the time of making his will and at his death, entitled to a freehold estate in fee-simple situate at Low Braithwaite in Cumberland of the yearly value of 70*l.*, and to freehold and copyhold estates situate at Sowerby Row and Longlands in the same county of the yearly value of 70*l.*: all these estates were subject to the rights of his widow to dower and thirds thereout. By his will, dated the 15th August, 1853, the testator devised as follows: "I give to John Pollock, son of Thomas Pollock, my nephew and heir-at-law, all my estate at Low Braithwaite in the parish of Hisket in the county of Cumberland, he paying unto my wife 40*l.* a year by two equal payments so long as she remains my widow, but if she marry again then my will is only 10*l.* a year from the said estate during her life. And I do hereby appoint Joseph Sowerby, John Simpson, and William Scott, trustees, under this my will, unto whom I give full power to act in conformity to this * my will. All my estate at * 322 Sowerby and my estate at Longlands I give into the hands of my trustees, to have power to let the same till all my nephews and nieces be of the age of twenty-one years. I give to my sister Margaret Parker 10*l.* a year to be paid to her in addition to the 4*s.* a week left her by my father, Isaac Monkhouse, during her life, the other part of the rents to pay my just debts should any bonds or notes stand against me at the time of my death: then, after the youngest of my nephews and nieces is of age, then my will is that the estates be sold by my trustees to the best advantage, and the price thereof to go in equal shares, share and share alike, amongst all my nephews and nieces, Joseph Parker and John Pollock excepted: should Margaret Parker be living, then my trustees

the widow in her husband's will does not affect her claim to one-third of his undivided personal property, if there be any such. *Kempton*, App't, 23 Pick. 163; *Nickerson v. Bowly*, 8 Met. 424; *Briggs v. Hosford*, 22 Pick. 288. For circumstances showing, or amounting to, an election by the widow, see *Quarles v. Garnett*, 4 Desaus. 146; *Blunt v. Gee*, 5 Call, 481; *Shaw v. Shaw*, 2 Dana, 342; *Clay v. Hart*, 7 Dana, 6; *Watkins v. Watkins*, 7 Yerger, 283; *Pearson v. Pearson*, 1 Bro. C. C. (Perkins's ed.) 292 and notes; *Wake v. Wake*, 1 Ves. (Sumner's ed.) 335 and notes; *Wilson v. Hamilton*, 9 Serg. & R. 424. The statutes of some of the States fix the period of time within which the widow shall make her election. See 1 *Jarman Wills* (4th Am. ed.), [397] 393, in note; 4 *Kent* (11th ed.), 58, 59; *Craven v. Craven*, 2 Dev. Eq. 338; *Reid v. Campbell*, Meigs, 378; *M'Daniel v. Douglass*, 6 Humph. 220; *Thompson v. Egbert*, 2 Harr. 460; *Hastings v. Clifford*, 32 Maine, 132; 1 *Lead. Cas. on Eq.* (3d Am. ed.) 418, 419.

to secure her 10*l.* a year during her life, and after her decease to be divided as above : my trustees to take to themselves reasonable expenses for their trouble ; no wood to be cut or sold but what may be wanted for necessary repairs of the buildings, which I leave to the discretion of my trustees : if my wife should have a child or children by me born after my decease, this will is of no effect, as such child will be heir to all I have, and, if more than one, share and share alike." The testator died in the year 1837, leaving Sarah Monkhouse, his widow, him surviving.

The widow died on the 14th February, 1847, having received from the trustees of the will her dower and thirds in respect of the estates at Sowerby Row and Longlands, and having also received out of the rents of Lower Braithwaite the annuity of 40*l.* given her by the will. In December, 1849, the present suit was instituted by the nephews and nieces of the testator for the purpose of carrying into effect the trusts of the testator's will : the bill charged

that Sarah Monkhouse was bound to elect between the
 * 323 annuity of 40*l.* and her dower and thirds out * of the
 estates at Sowerby Row and Longlands, and that she ought to be deemed to have elected to take the annuity, and an account was prayed accordingly.

The question thus raised came on to be determined, upon the hearing on further directions, before the Vice-Chancellor KINDERSLEY, who made an order, dated the 4th June, 1853, declaring that the widow was bound to elect, and that she must be deemed to have elected the annuity, and that the trustees of the testator's will were not entitled to be allowed the sums paid by them in respect of dower.(a)

Against this order, John Simpson and William Scott, the surviving trustees of the testator's will, appealed ; and the case now came on before the full Court of Appeal.

Mr. Swanston and *Mr. Bagshawe, Jr.*, in support of the appeal. — There is no inconsistency between the provisions made for the wife in this will and her right to dower. The Vice-Chancellor was apparently of this opinion, but thought he was bound by decisions to the effect that a devise in trust to lease indicates an intention so to dispose of the estate that the wife's enjoyment

(a) 1 Drewry, 488.

of dower is inconsistent with it. It is submitted, however, that a power to lease cannot of itself warrant this conclusion, and that so to hold is to depart from the true application of the principle of the general rule, that an intention must be collected from the words of the will that the testator did not intend his widow to have her dower. The Vice-Chancellor followed his own decision in *Gibson v. Gibson*, (a) which proceeded upon the case of *Hall v. Hill*, (b) * before Lord ST. LEONARDS in * 324 Ireland, followed by the Lord Justice KNIGHT BRUCE, when Vice-Chancellor, in *Grayson v. Deakin*. (c) In a recent case, however, *Warbuton v. Warbuton*, (d) Vice-Chancellor STUART took a different view of the law, and also of the decision in *Hall v. Hill*; (b) and under these circumstances the question is now raised, the Court of Appeal not being of course fettered by the same considerations as prevailed with the Vice-Chancellor. The grounds on which the appellants rely are, that the will must in itself contain evidence that the mind of the testator was directed to the question of dower, and that he intended to exclude his widow from taking dower, and then that his giving a power to lease is no evidence of such intention.

[They cited and commented on, in support of this argument, the following authorities, in addition to those before noticed: *Lemon v. Lemon*, (e) *Hitchin v. Hitchin*, (g) *Pitts v. Snowden*, (h) *Arnold v. Kempstead*, (i) *Villa Real v. Lord Galway*, (k) *Jones v. Collier*, (l) *French v. Davies*, (m) *Pearson v. Pearson*, (n) *Foster v. Cook*, (o) *Strahan v. Sutton*, (p) *Greatorex v. Cary*, (q) *Birmingham v. Kirwan*, (r) *Chalmers v. Storil*, (s) *Dickson v. Robinson*, (t) *Roberts v. Smith*, (u) *Lawrence v. Lawrence*, (v) *Miall*

(a) 1 Drewry, 42.

(b) 1 Dru. & War. 94.

(c) 3 De G. & S. 298.

(h) Mentioned in a note, see 1 Bro. C. C. 292.

(i) 2 Eden, 236; Amb. 466.

(k) Amb. 682; 1 Bro. C. C. 292, n.

(l) Amb. 730.

(m) 2 Ves. Jr. 572.

(n) 1 Bro. C. C. 292.

(o) 3 Bro. C. C. 347.

(p) 3 Ves. 249.

(d) 2 Sm. & G. 163.

(e) Vin. Ab. Devise (T. c.), 45.

(g) Prec. Chanc. 133.

(q) 6 Ves. 615.

(r) 2 Sch. & Lef. 444.

(s) 2 V. & B. 222.

(t) Jacob, 503.

(u) 1 S. & S. 513.

(v) 1 Swanst. 398, n.

v. *Brain*, (a) *Butcher v. Kemp*, (b) *Dowson v. Bell*, (c) *Harrison v. Harrison*, (d) *Roadley v. Dixon*, (e) *Ellis v. Lewis*, (g) *Lowes v. Lowes*, (h) *Taylor v. Taylor*, (i) *Holditch v. Holditch*, (k) *Lord Ranccliffe v. Lady Parkyns*, (l) *Lord Dorchester v. The Earl of Effingham*, (m) *O'Hara v. Chaine*. (n)

Mr. Glasse and *Mr. Murray*, for the plaintiffs, supported the decision of the Vice-Chancellor. — They considered that it was not necessary to go again through the authorities, which were fully before the Court, and submitted that they completely bore out the conclusion arrived at by the Vice-Chancellor. The present case included every ingredient which had ever been relied on as showing an intention to exclude the wife from dower. There was an annuity expressly given to the wife; and powers to sell, to lease, and also to cut timber, were vested in the trustees.

Mr. Willcock and *Mr. Bovill* appeared for some of the defendants, who took the same view of the case as the plaintiffs.

Mr. Swanston did not add any thing to his argument in reply.

THE LORD CHANCELLOR. — I do not entertain any doubt upon this case. It is not, I think, quite correct to state the general rule of law as being, that, to raise a case of election against the wife, the will must show that the testator had in his mind her right to dower, and that he meant to exclude it; the rule rather is,
 * 326 that it must appear from the will that the * testator intended to dispose of his property in a manner inconsistent with the wife's right to dower. The decisions of Lord ST. LEONARDS in *Hall v. Hill* (o) and *O'Hara v. Chaine*, (n) followed as they have been by cases in this country, proceeded on the power to lease given to the trustees, thus laying hold of a reasonable and very

(a) 4 Madd. 119.

(b) 5 Madd. 61.

(c) 1 Keen, 761.

(d) *Ib.* 765.

(e) 3 Russ. 192.

(g) 3 Hare, 310.

(h) 5 Hare, 501.

(i) 1 Y. & C. C. C. 727.

(k) 2 Y. & C. C. C. 18.

(l) 6 Dow, 149.

(m) Sir G. Coop. 319.

(n) 1 Jones & Lat. 662.

(o) 1 Dru. & War. 94.

intelligible distinction, and one which is consistent with all the cases against the right to elect, even supposing those cases to be rightly decided. The power to lease, which must mean a power to lease the whole, cannot, as Lord ST. LEONARDS observed, be exercised subject to the wife's right to have a third part of the estate set out by metes and bounds. If any other ground were needed for holding that the present is a case of election, it might be found in the circumstance, pointed out by *Mr. Murray* in the argument, that the trustees have power to cut down timber on any part of the estate: this would be entirely inconsistent with the wife's right to dower. The case thus seems to me to be quite clear; and the decisions of Lord ST. LEONARDS, followed by the Lord Justice KNIGHT BRUCE when Vice-Chancellor, by Sir JAMES WIGRAM, and by Vice-Chancellor KINDERSLEY, not only show that the power to lease is a distinction, but that it has been recognized and acted on; and I think we ought not to raise a doubt upon the point. The appeal must therefore be dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE. — *Mr. Swanston*, as he always does, has on this occasion afforded to the Court every assistance that it was possible to afford; but I acknowledge that he has not been able to raise a doubt in my mind upon the point in dispute. The question is, whether the Court is bound by authority to read this will in a different way from that in which * every * 327 reasonable being, not a lawyer, would read it, and I think the Court not so bound; that is, I consider that none of the authorities on which the appellants rely, unless perhaps *Warbuton v. Warbuton*, can be construed as the appellants contend.

THE LORD JUSTICE TURNER. — I agree entirely in the conclusion at which the Lord Chancellor and the Lord Justice KNIGHT BRUCE have arrived. It is said that the authorities have left the point before us in doubt. That must of course be so to some extent. There can be no settled rule on a matter which depends on the intention to be collected from each particular will. On this particular will, however, I have not felt any doubt. The question is, whether the testator meant here to pass his own interest only in the estate, or to pass the entire estate. He has given to the trustees a power to lease: this power could not be exercised if the wife was entitled to dower. Such a right would be clearly inconsis-

tent with the power. It is said, that it is not shown that the testator had present to his mind the question of dower, or that he knew that his wife was entitled to dower; but a man devising a property must be taken to know what his interest in that property is. The will also gives to the trustees the management of the estate, and directs them to make such repairs as they may deem necessary: this provision is also inconsistent with the existence of a right to dower in the wife.

1854. May 27. June 3, 5, 7. August 5. Before the Lord Chancellor Lord CRANWORTH.

The principle on which substituted service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant.²

The Court of Chancery has jurisdiction over the custody of the children of an English subject, though such children were born and are resident abroad.³

A married woman, residing in France, on whom service had been substituted, having intrusted to her by the French Court the interim custody of her children until the result of certain proceedings instituted by her in this country for a divorce was ascertained, ordered by the Lord Chancellor to concur with her husband in taking all necessary steps for the purpose of delivering up the children to him, with the view to their being brought over to and educated in England. She appealed from the Lord Chancellor's order, and successfully resisted her husband's application in the French Court for the delivery of the children, on the ground of the pendency of the appeal. On the matter being again brought before the Lord Chancellor, he made another order upon the wife in the same terms, but requiring compliance within a week, and prefaced with a declaration, that, by the law of England, an appeal from an order pronounced by the Lord Chancellor does not suspend its operation.⁴

THIS case came on to be heard by the Lord Chancellor as an original motion, at the request of the Master of the Rolls, before whom it had been in part opened.

¹ S. C., 8 De G., M. & G. 731; 3 Jur. N. S. 454.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 447, 448.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1350; *Dawson v. Jay*, *In re Dawson*, 3 De G., M. & G. 764.

⁴ See 2 Dan. Ch. Pr. (4th Am. ed.) 1467 and note (3); *Peer v. Cookerow*, 1 McCarter (N. J.), 361; *Schenck v. Conover*, 2 Beasley (N. J.), 31; *Wood v. Farthing*, 8 W. R. 425, L. C.

The following are the circumstances out of which the questions arose: In the year 1836 the defendant Adrian John Hope, a domiciled Englishman, intermarried with Emilie Melanie Mathilde Rapp, the daughter of a French officer. They lived together until February, 1853, when unhappy differences arose. There were five children of the marriage; the three elder were daughters, and the two younger were sons, Adrian Elias and Jean Henry, who were born in France in 1845 and 1847 respectively.

In February, 1853, Mr. A. J. Hope, who had been up to that time nearly ten years resident in France, came to London, bringing with him his three daughters for education. In May, 1853, the two male children were also brought to England by Mr. A. J. Hope, and placed under the protection of their paternal uncle, Mr. A. B. Hope. Immediately after their arrival in this country representations were made to Mr. A. J. Hope, by the physicians of Mrs. Hope, that she was suffering under * a severe * 329 illness which was caused by the removal of her sons; Mr. A. J. Hope, having regard to such representations, was prevailed upon conditionally to restore them to her custody in Paris. Upon this occasion Mrs. Hope signed the following undertaking:—

“ 23, Quai d’Orsay, Paris, May 18, 1853.

“ I, the undersigned, undertake to place in the hands of their father my two boys, Elias and Jean Hope, in three months, to date from the 20th May, that is to say, the 20th August, that their father afford them such education as he may deem advisable, either with him or with a preceptor in France or in England.

“ M. HOPE RAPP.”

On the 26th May, 1853, Mr. A. J. Hope returned to England, and on the 4th June following he was served with a citation to appear before the tribunal of the first instance in Paris, on a suit of separation instituted by his wife. The citation, after alleging various acts of cruelty on the part of Mr. A. J. Hope, prayed for a separation from her husband, with a separate maintenance, authority to reside in the house of the Quai d’Orsay, and the right to retain in her custody the two sons. The question raised upon that citation came on to be heard on the 9th June, 1853, when Mr. A. J. Hope having appeared, the following judgment was pronounced: “ Whereas there is a question of separation of body between

two aliens, and that we can decree only upon measures provisional, urgent, and conservative: in consideration of the circumstances we have addressed observations to the parties to attempt a reconciliation, and Mrs. Hope having persisted in her demand, we declare ourselves incompetent — *et renvoyons les parties à se pourvoir sur la demande en séparation devant les juges qui peuvent en connaître.* With regard to the measures, provisional and urgent, —

concerning the residence of Mrs. Hope, we give force to * 330 the arrangement * of the parties, that, on the demand and designation of Mr. Hope, Mrs. Hope consents to retire to the convent of the ‘Dames Augustines.’ Concerning the children, — whereas Mr. Hope has with him three children born of the marriage, and that in a recent reconciliation it was agreed between the husband and wife that the two children claimed should remain with Mrs. Hope for several months, that to deprive her of all her children would be a source of irritation, which might be injurious to the prospect of a reconciliation ulterior and desirable, — we say that the two children shall remain with Mrs. Hope at the convent of the ‘Dames Augustines,’ and that Mr. Hope shall have power to see them at all times that he shall judge fit, without removing them, and in conformity to the rules of the house.”

On the 22d June, Mrs. Hope obtained a further order from the same Court, by which she was permitted, for the benefit of her health, to remove, with the two boys, from the convent to a watering-place in the Pyrenees. Mr. Hope appealed from these decisions, and on the 29th June judgment was given by the Imperial Court to the following effect: “Considering that the Hopes, husband and wife, being aliens, foreign tribunals alone are competent to pronounce in disputes, the object of which is to modify the legal conditions of marriage; but considering that it is competent to the French tribunals, when a demand of separation of body is made by a foreign woman, to provide for her wants and her safety; that it is equally competent to them to take those measures which the age and health of the children born of the marriage conditionally require, and adopting the grounds of the decision of the Court of the first instance, — *Confirme et néanmoins ordonne que les deux enfans provisoirement confiés à la garde de la femme Hope* seront remis à leur père le 15 Septembre, 1853, s’il n’en a * 331 été autrement * ordonné par les Tribunaux Anglais, juges du fond: condamne Hope en l’amende et aux depens.

Mrs. Hope then commenced a suit in England, in the Court of Arches, for a divorce, which is still pending; and on the 5th October, 1853, applied to the Imperial Court in France for an extension of the time during which the children were to remain in her custody, and for permission to change her residence, when a decree was made to the following effect: "Considering that there is a question only before the Court of measures provisional, pour lesquelles on ne peut opposer l'autorité de la chose jugée; considering, chiefly, that the time during which Mrs. Hope was authorized by the previous decisions to keep her two children was limited by the Court to the 15th September only in order to compel her to begin and follow up before the competent tribunal the demand of separation of body, and in expectation of the decision of the rightful judges — *des juges du fond* — upon this point at that time; but it appears, from the documents produced, that the suit is followed up by Mrs. Hope in England, that a decision on the provisional measures can be obtained in four months, commencing from this day, and that it is for the interest of the children that they should remain under the guardianship of their mother during these four months at least, unless it has been otherwise decreed by the rightful judges — *juges du fond* — before the expiration of this time; and whereas it is convenient to fix the residence of Mrs. Hope in another place than the convent of the 'Dames Augustines,' the Court decrees that the two children shall remain in charge of their mother for four months, to commence from this day, on an undertaking on her part to allow them to be visited by their father three times a week, between the hours of three and five in the afternoon, and the Court authorizes Mrs. Hope to make them reside with her * at the Hôtel Molé, Rue du Faubourg, * 332 Saint Honoré." By a subsequent decree of 11th February, 1854, the French Court being satisfied that Mrs. Hope was prosecuting the English suit with diligence, prolonged her custody of the children "*jusqu'à ce que la juridiction compétente ait statué sur cette question,*" and they accordingly remained with her up to the time of the present application.

Mr. Hope having previously settled 1000*l.* consols upon his children, in order to obviate all technical objections as to their right to be considered wards of this Court, this bill was filed on the 14th November, 1853, by the five children, by Francis Henry Dickenson, their next friend, against Mr. and Mrs. Hope and the

trustees of the settlement, and prayed the execution of the trusts of the settlement; that Mrs. Hope might be ordered to deliver up the two children, Adrian Elias and Jean Henry, to their father; that they might be educated in England under the direction of their father, or of such other person as the Court might direct; and that Mr. Hope might be authorized to make the necessary application to the French Court to obtain possession of the children.

Mrs. Hope did not appear. Her solicitors, Messrs. Grover & Coare, in the suit in the Ecclesiastical Court, were applied to and asked whether they would accept service of the copy of the bill enclosed with the application, and their answer was that they would answer after communicating with their client. On a further application by the plaintiffs' solicitors to Messrs. Grover & Coare, the latter declined to accept service of the bill, on the ground that they were not instructed to appear in the suit for Mrs. Hope. On

the 22d November, 1853, an order for substituted service
* 333 upon them was obtained * by the plaintiffs, on an affidavit

by a clerk of their solicitors stating the above circumstances, and that he had heard that Messrs. Grover & Coare had retained counsel for Mrs. Hope; and on the 26th November a notice of motion for the custody of the children was served upon them in pursuance of the *ex parte* order for substituted service.

The motion came on to be heard before the Master of the Rolls on the 9th May, 1854; and, although no regular appearance was entered for Mrs. Hope by Messrs. Grover & Coare, yet, between the 26th November, 1853, and 9th May, 1854, they had been in constant communication with the solicitors for the plaintiffs on the subject of various affidavits filed in the interval by Mr. and Mrs. Hope; and they had also instructed counsel, on several occasions when the motion ought to have come on, to apply for time in order to file fresh affidavits.

A preliminary objection was taken on that occasion by the counsel for Mrs. Hope to the order for substituted service; and the plaintiffs having agreed to accept short notice of motion for the discharge of that order, the motion for its discharge was thereupon argued before his Honor, who held that there was sufficient *prima facie* evidence of the authority of Messrs. Grover & Coare to act as Mrs. Hope's agents.

An appearance accordingly was entered for Mrs. Hope, with

liberty to withdraw it if the order for substituted service should be discharged on appeal.

The question of the jurisdiction of the Courts of this country over infant wards abroad was then argued, when the Master of the Rolls expressed his opinion to the effect that the Court of Chancery had such jurisdiction. His Honor having intimated some doubts as to the * means of enforcing his order * 334 if he should make one in the terms of the notice of motion, and the defendant Mrs. Hope having expressed a resolution of appealing on the question of jurisdiction, the motion stood over by arrangement, that the whole matter might be brought before and heard by the Lord Chancellor as an original motion.

Mr. R. Palmer and *Mr. Amphlett*, in support of the motion. — By the law of this country a father is entitled to the guardianship of his children, and this Court will not take away from him the custody of his children who may happen to be wards of Court, unless he has grossly abused his parental office. *Prima facie*, the very fact of a ward being out of the jurisdiction is a ground for this Court's intervention; but in the present case, the children are not only out of the jurisdiction, but confessedly not with their proper guardian. It will probably be argued that the French Courts have exclusive jurisdiction in the matter, and that this Court ought not to act when there may be a possible conflict with the foreign tribunals; but so far from there being any probability of such a result, the French Courts have virtually disclaimed any such jurisdiction, and by assuming to take only provisional measures, they have expressly recognized the proper jurisdiction to be in this country. It will also be contended that this Court has authority to interfere by the appointment of guardian only where the infant is within its jurisdiction, and some dicta to this effect, in the case of *Johnstone v. Beattie*, (a) will be relied upon; but it will be observed that, in that case, there was nothing to give this Court jurisdiction, except the fact that the infant happened to be in England. We rely, however, on that case for the proposition laid down by Lord LYNDEHURST; (b) namely, that upon the institution of a suit of * this description, the plaintiff (the infant) becomes a ward * 335 of Court. Unless, then, it can be shown that, owing to the

(a) 10 CL & Fin. 42.

(b) See page 84.

mere circumstance of these infants being abroad and out of the jurisdiction, or for some reason other than that of being born abroad, they are precluded from filing such a bill, it is clearly competent for them to do so; and if, as appears by the case of *Johnstone v. Beattie*, (a) the place of birth makes no difference as to the powers of this Court, assuredly the place of residence cannot affect its jurisdiction. *Salles v. Savignon*. (b) It is quite clear that this Court will appoint guardians to infants out of the jurisdiction: *Stephens v. James*; (c) and on an analogous principle, a commission of lunacy will issue against a person out of the jurisdiction. *Ex parte Southcot*. (d) We submit that, unless the jurisdiction which we invoke is shown not only to be powerless, but that the foreign tribunal will refuse to recognize its authority, this Court is bound to interfere. In the case of *Re Spence*, (e) where the Court declined to make any order, the facts were altogether different: there the infants had been taken abroad, but the mother, in whose custody they were, was not, as in the present instance she must be taken to be, before the Court, and the

* 336 respondents, who, * it was alleged, had aided the mother in taking the children out of this country, swore that they never were either in their custody or control. With respect to the status of these children, it is clearly English, while they owe allegiance to the British Sovereign, being declared to be natural-born subjects of the Crown of Great Britain (4 Geo. 2, c. 21, and 13 Geo. 3, c. 21); and the fact that, by the 9th article of the 1st chapter of the 1st book of the Code Civile, a child of a foreigner, born in France, may, one year after attaining twenty-one, elect

(a) 10 Cl. & Fin. 42.

(b) 6 Ves. 572. The facts are more fully stated by Lord CAMPBELL, in the report of *Beattie v. Johnstone*, in the House of Lords (10 Cl. & Fin. 42, see p. 134): "A gentleman and a young lady, natives of the island of Martinique, domiciled there, aliens and French subjects, happened to be in England; the young lady had property in Martinique, and none in England. The gentleman, wishing to marry her, wrote to her mother, who was her guardian, in Martinique, offering any settlement that might be approved. They then went to Scotland, and were married there. After they had left England, and on the very day on which they were married in Scotland, a bill was filed to make her a ward of Chancery. They afterwards returned to England, probably on their way to Martinique; and the gentleman was proceeded against for a contempt, in marrying a ward of Chancery.

(c) 1 M. & K. 627.

(d) 2 Ves. 401.

(e) 2 Phil. 247.

to become a French citizen, cannot divest the child of its nationality, for at most it is only an inchoate potential right, which by the 13th article of the same code can only be effectuated by the authorization of the French government. *In re Adam.* (a)

On the question of substituted service, the following authorities were relied upon: *Bromley v. The Bank of England*, (b) *Hobhouse v. Courtney*, (c) *Luckie v. Forsyth*, (d) *M' Loughlin v. M' Loughlin*, (e) *Weymouth v. Lambert*, (g) *Cooper v. Wood*, (h) *Murray v. V-part*; (i) and it was urged, that, even assuming the order for substituted service to have been irregular, the irregularity had been waived, Mrs. Hope having been informed of the suit in this Court, and there being no denial on oath of the authority of the solicitors to appear on her behalf. *Hunter v. Capron*, (k) *Steele v. Plomer*. (l)

The Solicitor-General, Mr. Terrell, and Mr. Wise, for Mrs. Hope. — We submit, by way of preliminary objection, that the *ex parte* order for substituted service now sought * to be dis- * 337 charged was not an order obtained by Mr. Hope, the husband, but by the infant plaintiffs in a suit which does not involve the question of any disputes between their parents. Such an order can only be supported by the evidence on which it was obtained; and the utmost extent of the evidence which has been adduced serves only to show that Messrs. Grover & Coare were the solicitors of Mrs. Hope, acting as the agents between her and her proctor, in reference to the suit pending in the Ecclesiastical Court. Not one of the grounds on which service is substituted on solicitors is shown to exist in this case. Messrs. Grover & Coare have not been proved to be Mrs. Hope's agents *in hac re*. They clearly do not possess a general authority to represent her, nor do they represent her in an action at law respecting the same matter, nor has she gone abroad to avoid service. On this head they referred to and commented on the following cases: *Smith v. The Hibernian Mining*

(a) 1 Moore, P. C. C. 460.

(b) 7 Jur. 120.

(c) 12 Sim. 140.

(d) 7 Irish Eq. 181.

(e) 8 Irish Eq. 157.

(g) 3 Beav. 333.

(h) 5 Beav. 391.

(i) 1 Phil. 521.

(k) 7 Jur. 185.

(l) 2 Phil. 780.

Company, (a) Roberts v. Watley, (b) Bond v. The Duke of Newcastle, (c) Rickcord v. Nedriff. (d)

Mr. R. Palmer, in reply upon the preliminary objection. — The form of the suit cannot make any difference when in truth the suit in the Ecclesiastical Court and the present are substantially for the same matter. Here the relation of solicitor and client actually subsisted, and the necessary presumption from the facts is, that Mrs. Hope had notice of the whole of the proceedings.

The Lord Chancellor, having intimated a strong opinion in favour of the validity of the order for substituted service, desired that the argument as to the jurisdiction might proceed, ob-
* 338 serving that he would dispose * of the whole question when he gave his judgment. The argument for the respondent then proceeded.

The Solicitor-General, Mr. Terrell, and Mr. Wise. — Assuming the present application to be that of the father, which it is not, still this Court will not interfere to assist him in an act which he may do himself without such assistance. Why does he not go over to France and claim his children? If the suit in the Ecclesiastical Court is a bar to his right, it is a bar also to this Court's interference; and if the judicial proceedings in France present an impediment to his reclaiming his children (which alone could justify such a bill), that would afford a conclusive reason against the interference of this Court: but there is no allegation in the bill that Mr. Hope cannot obtain the custody of his children. The present cannot under any circumstances be entertained by the Court as the application of Mr. Hope; but if it is to be so regarded, and if it is assumed that the infants are in the custody of a stranger, who refuses to deliver them up, still this Court will not interfere on the mere petition of the father, nor without a bill filed. *Ex parte Hopkins. (e)* Here, however, the father has not even applied, nor is he even represented on this occasion.

[In the course of the argument *Mr. J. W. Stephen* was instructed to appear for Mr. Hope.]

(a) 1 Sch. & Lef. 238.

(d) 2 Mer. 458.

(b) 2 Coll. 389.

(e) 3 P. Wms. 152.

(c) 3 B. C. C. 386.

It has been said that the Lord Chancellor, acting for the Sovereign as *parens patriæ*, has the right to interfere in such cases, but the Sovereign's jurisdiction over the person is territorial, (a) and he can only interfere politically in a case like the present, where the children are out of the realm, while the Lord Chancellor is asked to act judicially. With reference to the Acts of Parliament * of this country which have been referred to, they * 339 cannot stamp the nationality of children born out of the influence of the municipal laws of this country. In addition to the fact that by the 9th article of the 1st chapter of the 1st book of the Code Civile, the child of a foreigner, born in France, has the right of asserting his title to become a French citizen the year after he attains his majority, the 10th article of the same Code Civile declares that the child of a Frenchman born in a foreign country is nevertheless a Frenchman: this is inconsistent with our law, and shows that by the comity of nations no such right exists as that asserted. If the French Court had committed the interim custody of these infants to a stranger instead of to their mother, this Court could not have interfered. One of the tests of this Court's right to interfere is to ascertain whether it has authority to execute the order which it may pronounce. In the case suggested, of the guardianship being by the French tribunal intrusted to a stranger, he would not be bound to obey an order in such a suit as this; even a judgment by a foreign tribunal cannot, according to the 546th article of the Code de Procédure Civile, book 5, title 6, be put in force in France. The main principle upon which the case of *Beattie v. Johnstone* (b) was decided, excludes the notion that this Court would interfere in cases where the child is not within its jurisdiction. No doubt the Crown might direct an individual to return to this country; so too it might, in the exercise of its prerogative, issue the writ *ne exeat regno*, but the extent of its authority in case of disobedience would only be to sequester the goods. *De Manneville v. De Manneville*. (c) Here Mrs. Hope is in no sense amenable to this Court; she is not only not within the jurisdiction, but she denies the jurisdiction and authority of this Court. The French Courts have decided that * they have * 340 the power of disposing of the interim custody of these infants, whom they have confided to the care of Mrs. Hope until the

(a) Story's Conflict of Laws, pp. 26, 27.

(b) 10 Cl. & Fin. 42.

(c) 10 Ves. 52; see p. 63.

decision of the Ecclesiastical Courts of this country is obtained, and Mr. Hope is bound by that authority, having raised the issue in the French Court, whose decision could have had no reference to any proceedings in this Court, for this suit was not even contemplated when the French Courts pronounced their decision.

Mr. R. Palmer, in reply. — It was said that this Court would not interfere, as to the custody of children, at the instance of the father, without a bill filed by him ; but the case of *Eyre v. The Countess of Shaftsbury* (a) is an express authority to show that “ this Court may, upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard the care of all infants is lodged in the King,” and the mere fact of these infants being abroad cannot disable them from filing a bill to be made wards of Court, as it is competent to any one, though abroad, to file a bill. The only impediment to such a proceeding is the security which may be exacted for costs, which here the next friend is responsible for. We are not desiring any thing by this motion which may lead to a possible conflict with the laws of France, by calling on this Court to make an order on the French Courts : all we ask is, that we may be authorized to take such steps in France as we may be advised in conformity with the laws of that country. So far from there being any ground to suppose that the French Courts will arrogate exclusive jurisdiction as to these children, the contrary is to be inferred from their own decree, wherein they profess to be in an attitude of expectancy for the result of the suit in the competent tribunals in this country. * The fact that the French tribunals have erroneously supposed the Ecclesiastical Courts to be the competent tribunal in such matters cannot affect the principle of their decision.

THE LORD CHANCELLOR. — Several points have been made in the course of the argument. The first question to be considered is, whether the parties are properly before me, or, in other words, whether Mrs. Hope has been properly served : in short, whether the order made by the Master of the Rolls in November last, for substituting service upon Mrs. Hope, was a proper order ; or if not

(a) 2 P. Wms. 103, see p. 118.

a proper order, whether her subsequent conduct has not disqualified her from objecting to it as irregular. I may here observe that the right to direct substituted service depends now not merely on the practice of this Court, but upon a recent statute, the 15 & 16 Vict. c. 86, the fifth section of which expressly empowers the Court to order substituted service to be effected in such manner and in such cases as it shall think fit. This statute made no alteration; it was only an enunciation by the legislature of what had always been the practice before. According to the rules of law, service ought either to be made personally, or at least by leaving notice at the dwelling-house of the party. But the rule of this Court differs in this respect from that of a Court of Law. Personal service, or service at the dwelling-house, may be impossible, because the defendant may be abroad; and yet it might be very unfit that he should not be litigated with in the same manner as if he were here, as he might have agents competent to represent and actually representing him in this country. Therefore, in cases where a defendant is abroad, the question is, whether there is any person here who may be fitly served, and service upon whom may be treated as equivalent to service upon the absent * person * 342 himself. Now, this has been allowed in a variety of cases; for instance, where there has been an agent in this country managing all the affairs of a defendant who is abroad, and regularly communicating with him upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit. In such cases, the Court has felt that it might safely allow service upon the agent to be deemed good service upon the person abroad, because the inference is irresistible that service so made upon the agent is service on a person either impliedly authorized to accept that particular service, or who certainly will communicate the process so served to the party who is not in this country to receive it himself. The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, every thing has been done that is required. Now, in this case, Messrs. Grover & Coare were the solicitors of Mrs. Hope in the proceedings which she instituted in the Ecclesiastical Court against her husband to obtain a divorce. It appears that the

French tribunals have decided that the question as to the custody of the children is dependent upon or at all events connected with that proceeding. According to their rules, the suit for divorce, or rather for a *séparation de corps* (which is very analogous to our divorce *a mensâ et thoro*), is a question that carries with it also the question as to the custody of the children; and here I must say, I think the French law is more rational than ours. However, administering the law, I am not to make myself wiser than our lawgivers, and the case is different in this country. The question of divorce does not draw with it, nor in any way connect itself with, the custody of the children. This being so, the children

* 343 * instituted a suit in this country, and filed a bill on the 14th November last, the main object of which is to cause the two male infants to be removed to the custody of their father from that of their mother in France, to whom their custody had been temporarily confided by the French Court, pending proceedings instituted by her in this country. The plaintiffs, being infants, of course sue by their next friend, but the application may be considered as substantially the application of their father, because he appears here and undertakes (as I understood) to find all the means for the maintenance and education of his children during their minority. A small sum has been vested in trustees, to give the Court a formal jurisdiction. I give no opinion as to whether that was necessary to be done; it was, however, merely vested in order to shut out the possible objection as to the authority of the Court to interfere in cases like the present, on the assumption that the presence of property is essential to the exercise of such a jurisdiction.¹ Under all the circumstances, my opinion is that the service upon Messrs. Grover & Coare was a perfectly good service, and that the order of the Master of the Rolls was strictly correct; because in such a case you are not to look at the mere form of the service, but to the substance. It is true that their being Mrs. Hope's agents with reference to the suit for the divorce does not necessarily imply that they were her agents with regard to the question of the custody of the children, but it is impossible not to see that they were acting for her on the question of her separation from her husband; and that question being one which in France, where Mrs. Hope is residing, has incident to it the further question

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1348.

respecting the custody of the children, it is impossible to suppose that Messrs. Grover & Coare did not communicate with her. Indeed, all doubt on that point is excluded by the evidence, which proves that in answer to an application by the plaintiffs' solicitors as to whether * these gentlemen would appear for * 344 Mrs. Hope, they said they would communicate with their client on the subject; and afterwards, on being again applied to, they said that they had received no instructions from her: the inference from that is irresistible, that she was perfectly aware of all these proceedings, which doubtless were communicated by Messrs. Grover & Coare to her within twenty-four hours of their occurrence. But it is not necessary for me to decide that the order was right in the first instance, because, even if by accident Mrs. Hope was not aware of the proceedings before the order was made, it is quite obvious that she had a full knowledge of it immediately afterwards, and in fact she appears before the Court. I do not say that she enters an appearance in form, but she substantially appears by filing affidavits here and procuring further affidavits to be filed by other persons, in order to resist the present application. She has thus waived all formality, and to all intents and purposes has entered an appearance as a defendant. It has been said, that, being a married woman, she could not enter an appearance without the authority of her husband; but if that was so, Mr. Hope could at any time enter an appearance for her, and such I should consider as now done. In point of fact, she has appeared separately, and has contested this question of the custody of the children, which in reality the husband, although nominally the next friend, is litigating with her. It appears to me, therefore, that in point of form there is no obstacle in the way of my deciding this case, and the question remaining to be answered is, whether I ought to make an order upon this application of the children to have them delivered over to their father. This depends upon questions of some importance, but I really do not think that they involve any great difficulty. The jurisdiction of this Court, which is intrusted to the holder of the great seal as the representative * of the Crown, with regard to the custody * 345 of infants, rests upon this ground, that it is the interest of the state and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriæ*, is bound to look to the

maintenance and education (as far as it has the means of judging) of all his subjects.¹ The first question then is, whether this principle applies to children born out of the allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because the moment that it is established by statute that the children of a natural-born father born out of the Queen's allegiance are to all intents and purposes to be treated as British-born subjects, of course it is clear that one of the incidents of a British-born subject is, that he or she is entitled to the protection of the Crown as *parens patriæ*. Now, this is an express provision of our statutes; and I have never met with any authority for a distinction between a subject born abroad and a subject born in this country. But a more difficult point has been raised; namely, putting aside the question as to the place of birth, how can the jurisdiction be exercised in the case of an infant who at the time the jurisdiction is asked is not within the jurisdiction of the Court? This is a more plausible objection than the one based on the mere place of birth, but it is not of a material nature, as bearing upon the existence of the jurisdiction. It may be that the child is placed under such circumstances that the jurisdiction of the Court cannot be exercised over it because no order I might issue could be enforced; but in that case there is not a want of jurisdiction, but a want of the power of enforcing it.² If, for instance, where an adult Englishman contracts for the purchase of an estate and goes out of the jurisdiction, nobody can doubt that I may decree specific performance, but of course the Court can have no control

* 346 over the purchaser, if it has * no means of reaching him.

So with an infant abroad; if the parents were also abroad, and the infant either had no property, or the property was likewise abroad, I should never say that I had no jurisdiction over the infant, if it was a British-born subject of her Majesty, though I might have no means of enforcing the jurisdiction. Therefore, it is putting the matter on a wrong footing to say, because the child is out of the jurisdiction, that the Court has no jurisdiction. In such a case, anybody might, by merely withdrawing himself from the jurisdiction, escape all liability to it. But the cases of *Logan*

¹ See 2 Story Eq. Jur. § 1341; *Clark v. Clark*, 8 Paige, 152.

² *Drummond v. Drummond*, L. R. 2 Ch. Ap. 32, 39. In *Boyd v. Glass*, 34 Geo. 253, it was held that the Probate Court cannot appoint a guardian over minors residing in another State.

v. Fairlee, (a) where a person resident in London was appointed guardian to an infant resident in Scotland, and *Stephens v. James*, (b) are express authorities in favour of the jurisdiction being exercised. In the latter case, the father withdrew with the child to the United States of America; and it was held, that the property being here, this Court had authority to order maintenance for the infant and to impose conditions on the guardians, with a view to the proper application of the money. In the case of *Dawson v. Jay*, (c) my attention was lately directed to a subject very intimately connected with the present question. It was said, however, that it by no means follows, that because such a jurisdiction over foreign children in this country undoubtedly exists, therefore the converse proposition, viz., that the jurisdiction with respect to children of British subjects resident abroad, is equally established. This is founded on an entire mistake. The reason why such a jurisdiction exists over foreign children in this country is, because foreign children, like adult foreigners, while here are to a certain extent the subjects of the Crown of England, and it has been decided that they are so for many purposes. It is very true that an extreme case may be put, such as that of a foreigner nearly twenty-one * years of age coming to this country, and no * 347 doubt it might be ridiculous to institute proceedings in this Court with the view of having such a person, who might be at Dover one morning and at Calais the next, made a ward; but that only amounts to this, that in laying down any general rule, there may be a case which comes so close upon the borders, that the exercise of the jurisdiction may be inconvenient, and in some instances absurd; but I do not think that such an exceptional case presents any difficulty to the exercise of the undoubted jurisdiction of this Court over infants. If the case were presented to me of a foreigner of very nearly twenty-one years of age, who wanted to go back to his own country, and a bill were filed asking me to order his maintenance, and so on, I should probably not interfere at all, but should ask the foreign parent what he desired, and then exercise my discretion, just as I do over wards who are clearly under my control. Thus, if circumstances make it expedient that an infant should be allowed to go abroad, I should of course allow it to go, as my predecessors have done, taking the proper security;

(a) Jacob, 193. (b) 1 M. & K. 627. (c) 3 De G., M. & G. 764.

but in the case where the infant was a foreigner, and nearly of age, and wished to leave this country, I should probably ask no security at all.

Assuming, then, that neither the circumstance of the infant having been born abroad nor being still abroad affects the jurisdiction, the question remains whether I ought, in the present instance, to exercise the jurisdiction. There might be cases in which it would be improper that I should attempt to exercise it, as, for example, where both the parents should be abroad, and there should be no property here; though, as I have before observed, I would not, even in such a case, say that I had no jurisdiction, if a bill were filed. I should in all probability not make an order, because the parties would not be within my control, and they might

* 348 disobey. * I should feel that I was doing no good, but incurring a sort of scandal, as every Court does if it attempts to make an order which it has no power of enforcing. But here it is to be observed that these circumstances do not exist. The father is within the jurisdiction; the mother, who though living at Paris yet is a party, and has appeared (for I consider her as having done so), and she is therefore, for this purpose, within the jurisdiction, and a person, therefore, whom an order of this Court may reach; and being here, I am not to assume that she will disobey any order that may be made upon her. Therefore I shall not abstain from making an order upon her merely because she happens to be residing at Paris. That no order could be made on a person abroad would be a dangerous principle to recognize in this country, where there are such facilities for travelling, and where a person may in a few hours get out of the jurisdiction by leaving almost any part of the kingdom, and as easily return again. Of course I shall take care to make no order which, under the French laws, as I understand them, she cannot lawfully obey. The laws of France, like those of any other country, when a British tribunal has to deal with them, must of course be treated as a matter of fact, and not as a technical question of law. By the laws of this country, the father is certainly entitled to have the custody of these two children, the youngest of them being beyond seven years of age.¹ Whether any order that I could make

¹ See 2 Story Eq. Jur. § 1341; *State v. Richardson*, 40 N. H. 272; *In re North*, 11 Jur. 185; *Curtis v. Curtis*, 5 Jur. N. S. 1147; 28 L. J. Ch. 458; 7 W. R. 474, V. C. K.; *Ex parte Woodward*, 17 Jur. 56; *Miner v. Miner*, 11

would have extended to the youngest child at the time when the bill was filed, when the youngest child was under seven,¹ is not now a question for consideration: and it is also perfectly clear that by the law of England the pendency of the wife's suit in the Ecclesiastical Court to obtain a divorce does not prejudice or interfere with her husband's right to the custody of his children.² So much is perfectly certain. I do not say that it is a * right or a wrong state of the law, but the French tribunals * 349 must be informed, as a matter of fact, that such is the law, which admits of no controversy. It is quite proper, however, that the French Courts should be informed that this is a right which this Court can control and qualify when circumstances render such a course desirable and necessary. If, for instance, it could be shown that Mr. Hope — of which not a syllable is suggested to me at present — is an immoral or dissipated man, with whom if his children were placed their interests would be likely to be sacrificed, then this Court has the power, and it would exercise the power, of controlling his parental rights to any extent, whenever those rights clashed with the real interests of the children. That, of course, is a jurisdiction which the Court is extremely reluctant to exercise, as generally nothing can be more important than that the most intimate connection should be kept up between parent and child: but there may be circumstances rendering that connection improper, and when there are, this Court is authorized to and will

Ill. 43; *Smith, Pet.* 13 Ill. 138; *Schouler Dom. Rel.* 339; *Commonwealth v. Briggs*, 16 Pick. 203; *Hunt v. Hunt*, 4 Greene (Iowa), 216; *Adams v. Adams*, 1 Duvall (Ky.), 167; *People v. Brooks*, 35 Barb. (N. Y.) 85; *People v. Olmstead*, 27 Barb. (N. Y.) 9; *Ex parte Hewitt*, 11 Rich. (Law) S. C. 326; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. 497; 4 Sandf. Ch. 493; *Mayne v. Baldwin*, 1 Halst. Ch. 454; 2 Kent (11th ed.), 205 and note; *Cowls v. Cowls*, 3 Gilman, 435.

¹ See *Levering v. Levering*, 16 Md. 213; *Wand v. Wand*, 14 Cal. 512; *Commonwealth v. Maxwell*, 6 Law Rep. (1843), 214.

² In Massachusetts, the Court may, during the pendency of a libel for divorce, on the application of either party, make such order concerning the care and custody of the minor children of the parties as shall be deemed expedient for the benefit of the children: Genl. Sts. c. 107, § 32; and in making such order, the rights of the parents in the absence of misconduct shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession. *Ib.* § 37. See *Schouler Dom. Rel.* 341; *Bennet v. Bennet*, 2 Beasley (N. J.), 114.

interfere.¹ I have, however, no reason to believe that any thing of this kind applies to this case; I only know that a suit has been instituted in the Ecclesiastical Court, which does not seem to be prosecuted very vigorously; but nothing that I am in possession of leads me to suppose that there is any blame attaching either to the father or to the mother. Under these circumstances, what course am I to pursue? The children are in France. The course of proceeding in the French Courts has been most rational, and conformable with what jurisprudence ought always to aim at. They say that by the law of their country no divorce can take place; that there may be a *séparation de corps* (probably not much differing from our divorce *a mensâ et thoro*), but that in the present case

they have no jurisdiction, and they leave it to be decided in * 350 the country to which the parties belong. But * they say,

that by the law of France the Court there must provisionally determine matters urgent and conservative, and that there must therefore be some interim order, if the suit in the Ecclesiastical Court proceeds, directing what should be done in France with the children in the mean time, and that the direction as to the ultimate custody of the children should be given along with the decision upon the question of divorce in the Ecclesiastical Court. In this the French Court mistook our law: but for the honour of our law, I wish it were no mistake; for certainly it seems to be more reasonable that the two questions should be subject to the same instead of to separate jurisdictions. The subsequent order of the 11th February, 1854, is couched in a somewhat different

¹ See 2 Story Eq. Jur. § 1341; Anon. 2 Sim. N. S. 54; *In re Fynn*, 12 Jur. 713; *Thomas v. Roberts*, 14 Jur. 639; *In re Pulbrook*, 11 Jur. 185; *Cocke v. Hannum*, 39 Miss. 423; *Hunt v. Hunt*, 4 Greene (Iowa), 216; *Adams v. Adams*, 1 Duvall (Ky.), 167; *People v. Brooks*, 35 Barb. (N. Y.) 85; *Commonwealth v. Briggs*, 16 Pick. 203; *Bryan v. Bryan*, 34 Ala. 516; 2 Dan. Ch. Pr. (4th Am. ed.) 1349, note (9); *United States v. Green*, 3 Mason, 482; *State v. Richardson*, 40 N. H. 272; *People v. Mercien*, 25 Wend. 72; 3 Hill (N. Y.), 399; 8 Paige, 47; *Queen v. Clark*, 7 El. & Bl. 186; *Commonwealth v. Addicks*, 5 Binn. 520; *Armstrong v. Stone*, 9 Gratt. 102; *Pool v. Gott*, 14 Law Rep. (1851) 269. In a case where a decree absolute had been made for the dissolution of a marriage, on the ground of the husband's adultery and cruelty, the Court, being of opinion that neither the father nor mother was fit to be intrusted with the custody of the children, gave it to interveners, relatives of the husband. *Chetwynd v. Chetwynd*, L. R. 1 P. & D. 39. See *Rice v. Rice*, 21 Texas, 58; *Adams v. Adams*, 1 Duvall (Ky.), 167.

form, because it does not say that the wife shall have the custody of the children until the determination of the question of separation, but until the competent Courts of this country have determined what ought to be the custody of the children. I do not enter into any elaborate investigation of that order, but I have stated its substance, and therefore I would preface my order by the declaration which I think due to the French Court, that by the law of this country Mr. Hope is entitled to have his children delivered to him, notwithstanding the pendency of the suit in the Ecclesiastical Court for a divorce, and then I shall authorize Mr. Hope to take all necessary steps according to the laws of France for having the children delivered up to him; and I shall also order Mr. Hope to allow Mrs. Hope at all reasonable times to have access to her children, she being at liberty to apply to this Court in the event of such access being refused her.

The Lord Chancellor directed that the order should not be drawn up for a week, to enable the counsel for Mrs. Hope to decide in the mean time as to whether they would enter into the merits of the case, and read the * affidavits which contained many * 351 passages of a painful character.

The matter was not again brought before the Lord Chancellor within the time limited by his Lordship, but Mrs. Hope presented her petition of appeal to the House of Lords against his Lordship's order immediately after it was drawn up.

August 5.

This order, having been drawn up, was served personally on Mrs. Hope, with a demand of compliance; but instead of concurring in an application to the proper tribunal in France, with a view of carrying the order into effect, she instructed counsel to oppose the same. The application, however, was made by Mr. Hope to the French Court on the 27th June; and upon that occasion, the counsel for Mrs. Hope, resisting and submitting that the appeal from the Lord Chancellor's order had the effect of suspending the operation of that order, the following decision was pronounced: "Attendu qu'en admettant que la décision du Lord Chancelier d'Angleterre satisfait à la prescription de l'arrêt du 28 Juin de la Cour Impériale de Paris, qui renvoie devant le juge du fond, ou de l'arrêt qui renvoie devant l'autorité compétente, et

qu'il n'est pas nécessaire d'obtenir, en ce qui touche les enfants, une décision de la Cour Ecclésiastique saisie de la demande en séparation, il est certain, en droit général, que tout appel est suspensif, à moins d'une disposition de la loi ou d'une décision spéciale dans le jugement qui prononce l'exécution provisoire ; que la décision du Lord Chancelier admet le droit d'appel et qu'il est justifié d'un appel ; qu'on ne justifie pas d'une disposition générale de loi accordant le droit d'exécution provisoire aux décisions du Lord Chancelier ; que cette décision ne prononce pas l'exécution provisoire ; qu'ainsi l'appel est suspensif ; alors même que le

* 352 recours à la * Chambre des Lords ne serait qu'une voie extraordinaire, et surtout jusqu'il s'agit de la remise d'enfants par la mère d'origine Française, demanderesse en séparation contre le mari étranger, pouvant demeurer en Angleterre ; — Déclare Hope non-recevable dans sa demande, et le condamne aux dépens."

In consequence of that decision by the French Court, the plaintiffs now moved, that, " notwithstanding the appeal which has been brought by the defendant Emilie Melanie Mathilde Hope against the order of the 7th June, 1854, she may be ordered, within a week after the service of the order to be made on this motion, to deliver up the plaintiffs Adrian Charles Hope and Jean Henry Hope to the defendant Adrian John Hope, their father, and to concur with him in taking all such steps as may be necessary and proper, according to the laws of France, for causing the infant plaintiffs to be so delivered up to their father, and that Mrs. Hope be restrained by the order and injunction of the Court from opposing any application that may be made to the Courts in France for an order for delivering the infants to their father, or from otherwise hindering or preventing the delivery up of the children.

Mr. R. Palmer and *Mr. Amphlett*, in support of the motion, submitted that the order now asked was merely supplementary to that of the 7th June, and was required for the purpose of correcting the misapprehension of the French Courts as to the effect of an appeal upon an order made by a Court of competent jurisdiction in this country pending such appeal.

The Solicitor-General, Mr. Terrell, and *Mr. Wise*, on behalf of Mrs. Hope, contra. — This Court has discharged its legitimate function when * it declared what it conceived to be

the law of England with reference to the rights of the parties. The effect of granting this motion would be to place this Court in the position of pronouncing an order which it has no power to enforce.

Mr. J. W. Stephen appeared for Mr. Hope.

Without calling for a reply, the Lord Chancellor said: The former order of this Court asserted the right of Mr. Hope, the father, to the custody of these children. The children were, in fact, in France at the time, and there had been legal proceedings instituted in the French Courts relative to their custody. The question of the custody of children is not entirely a private question under the law of France; but in such cases the Procureur Impériale attends the Court, and in some degree, therefore, the state may be said to interfere with respect to the custody of infants in France. To prevent, however, the possibility of any order of mine leading those who obeyed it into conflict with the laws of France, the order of this Court was, upon deliberation, so worded as not in terms to require the children to be delivered up, because possibly the delivering them up might be a breach of the French law; but the order was cautiously drawn up, so as to call upon Mrs. Hope to join her husband in taking all the steps which might be necessary, under the laws of France, for the delivery up of the children to their father. The carrying out of that order might be very simple; it might consist in a mere compliance on the part of Mrs. Hope by giving up the children to Mr. Hope, or it might be that some application to the French tribunals is necessary to give it effect, and the latter is the case in this instance. Following the order of this Court, the father made an application * to the French tribunal to have the children delivered over * 354 to him. Now the course which, in obedience to that order, Mrs. Hope ought to have taken, was to have instructed counsel to signify, or by herself (in some way which the French law warranted) have signified, that she consented to the children being delivered up to Mr. Hope. If, after this, the French Court had said, "By our law that cannot take place, for certain reasons, or that it would be injurious to the health of the children, or for any other cause whatever, it would be a violation of our law to allow them to be given up," I should have been the last to have

attempted the exercise of any jurisdiction over what was done by the tribunals of France, for whose decisions I have always entertained the most profound respect. But no difficulty of this kind has happened in the present case. The question has been argued before the French tribunals, not on an application of the father, consented to and promoted by the mother, but on an argument raised by the wife against her husband, and by that course of proceeding she did that which the order of this Court substantially forbids her doing. Under such circumstances the question is, what course ought I now to adopt? If Mrs. Hope had not been abroad, I should have made a short order directing compliance within a limited time, and in default, that she should stand committed. The course, however, which on this occasion I shall pursue, will be dictated by the very peculiar circumstances of this case. It would seem idle, under ordinary circumstances, that I should preface an order of this Court with a declaration that by the law of England an appeal to the House of Lords does not suspend the execution of an order of the Lord Chancellor, unless the Lord Chancellor thinks fit so to order. Nevertheless, I shall here take

that course, there being nothing to prevent my enunciating
 * 355 what is the law of this country, while it may be desirable * to do so, as this case may again come before the French tribunals. In the present instance no such application has been made to me, asking me to suspend my former order; and I certainly should not have suspended its operation, if such an application had been made. The effect of my order being prefaced as I propose will amount to this, that if any discussions should hereafter take place before the French tribunals, those tribunals no doubt will give credit to me for having correctly enunciated the English law on this subject, as I am ready to give them credit for having correctly enunciated the law of France. My order will then proceed very much in the language I adopted before. I do not think I should restrain Mrs. Hope's counsel from resisting the execution of the order, because that might be misunderstood; but it will have substantially the same effect if I order her to abstain from any acts tending to oppose the execution of my order. I cannot venture to express any opinion as to what the French tribunals will do in the present instance, — that will no doubt depend on their own sense of their duty, and on their own law. All I can say is, that I shall announce in form to Mrs. Hope, but no doubt

practically to the French Courts, that by the law of this country an appeal to the House of Lords does not suspend the operation of my order; and with that declaration I shall order her within a week to deliver up these children to their father, or otherwise to concur with him in taking such steps as may be necessary for authorizing them to be delivered up to him according to the laws of France.

* In the Matter of The MIDLAND UNION, BURTON- * 356
UPON TRENT ASHBY DE LA ZOUCH & LEICES-
TER RAILWAY COMPANY, and of The JOINT STOCK
COMPANIES' WINDING-UP ACTS.

LUCY'S CASE.

1853. June 21. Before the LORDS JUSTICES.

To render valid the compromise of a litigation, it is not necessary that the question in dispute should really be doubtful, if the parties *bond fide* consider it to be so. Therefore where, after the decision in *Bright v. Hutton* (3 H. of L. 341), a person placed on the list of contributories as an allottee and provisional director, agreed to pay a sum in discharge of his liability under a compromise approved of by the Master, he was not allowed to recede from the agreement on the grounds that he had misapprehended the decision in *Bright v. Hutton*, and that there was really no question to be the subject of a compromise.¹

THIS was an appeal from the decision of Vice-Chancellor STUART, refusing to discharge an order of the Master under the above acts

¹ See Lord Belhaven's Case, 3 De G., J. & S. 41; 2 Lindley Partn. (Eng. ed. 1860) 1142, 1144; 1 Story Eq. Jur. §§ 121, 131; Stewart v. Stewart, 6 Cl. & Fin. 969; Leonard v. Leonard, 2 B. & B. 179, 180; Pickering v. Pickering, 2 Beav. 31, 56; Kerr v. Lucas, 1 Allen, 279; Leach v. Fobes, 11 Gray, 507; Sargent v. Larned, 2 Curtis, 340; Payne v. Bennet, 2 Watts, 427; Bennet v. Payne, 5 Watts, 259; Moore v. Fitzwater, 2 Rand. 442; M'Kinly v. Watkins, 13 Ill. 140; Perkins v. Gay, 3 Serg. & R. 327; Zane v. Zane, 6 Munf. 406; Weed v. Terry, 2 Doug. (Mich.) 344; Blake v. Peck, 11 Vt. 483; Durham v. Wadlington, 2 Strobb. Eq. 258; Brandon v. Medley, 1 Jones Eq. 313; Good v. Herr, 7 Watts & S. 253; Barlow v. Ocean Ins. Co., 4 Met. 270; Tuttle, 12 Met. 551; Williams v. Alexander, 4 Ired. Eq. 207; Mills v. Lee, 6 Monroe, 97; Brown v. Sloane, 5 Whart. 225; Logan v. Matthews, 6 Barr, 417.

for payment by the appellant of 350*l.*, according to a compromise entered into by him under the following circumstances, and also refusing leave to appeal, after the statutory time, from the original order, and placing the appellant on the list of contributories.

On the 29th of November, 1851, Mr. William Lucy (the appellant) was placed on the list of contributories as a provisional director and allottee, on the authority of *Hutton v. Upfill*, (a) which was decided by the House of Lords in August, 1851. He afterwards paid 100*l.* on account of his liabilities as a contributory.

On the 7th of June, 1852, the official manager wrote a letter to Mr. Lucy as follows :—

“ June 7, 1852.

“ Sir, — I beg to enclose for your signature the formal proposal of a compromise to be laid before the Master.

* 357 * “ I have great reason to think I shall succeed in effecting a speedy winding-up of the affairs of the company, and propose having an early meeting to carry out the proposed arrangements.

“ The executors of Sir W. H. Pearson and the administratrix of J. G. Norbury have consented to the sum of 450*l.*

“ If you have any influence with Mr. Unett, I hope it will be used successfully.

“ I am, sir, your obedient servant,

“ R. P. HARDING, *Official Manager.*”

The proposal enclosed in the above letter was as follows : —

“ I, William Lucy, of Edgbaston, near Birmingham, in the county of Warwick, having been settled upon the list of the contributories of the above-named company by WILLIAM HENRY TINNEY, Esq., the Master of the High Court of Chancery charged with the winding-up of the affairs thereof, am desirous of avoiding personally the expense of any further proceedings in this matter, and hereby propose to relinquish all claim against the said company in respect of the sum of 100*l.* advanced by me for the purposes of the said company in July, 1845, and further to pay forthwith to the official manager of the said company the sum of 350*l.* in full satis-

(a) 2 H. of L. 674.

faction and discharge of any right, title, claim, or demand which the said company, or the official manager thereof, may have or be entitled against me as a contributory of the said company as before mentioned. — Dated the 14th day of June, 1852.”

The official manager received back this document from Mr. Lucy, with the following letter: “I enclose you the paper signed as requested by you. I have consulted some of my friends here, who strongly advised me * not to do so, and I fear * 358 some of those who attended the meeting in London will not consent to the present proposal. However, I must take my chance, trusting that you will not allow any undue advantage to be taken.”

On the 15th of June the official manager replied as follows: “You have omitted to put your signature to the proposal, and I return it for that purpose. Mr. Bacon is of opinion that Mr. G. Unett is liable to contribute towards the 1300*l.* paid by Mr. Baxter; but as he did not agree to take shares, he cannot be considered as liable generally with the other parties. The compromise will most assuredly benefit the contributories generally, and I do hope all parties will concur in the arrangement.”

Mr. Lucy, on the 16th of June, 1852, replied as follows: “Mr. Baxter’s claim for 1300*l.* is included in his charge for 300*l.* made to us at the meeting at your office. I have no doubt that Mr. George Unett is liable for his share of the 1300*l.*, but do not know who is to make him pay. I now enclose you the document, duly signed, which I hope will be found correct.”

The Master appointed a meeting of the contributories for the 5th of July, 1852, to take the proposals for compromise into consideration.

Before the meeting was held, *Bright v. Hutton* (a) was decided by the House of Lords on the 28th of June, 1852.

Mr. Lucy attended the meeting, at which it was stated by the counsel for the official manager that the effect of * the * 359 decision of the House of Lords would be to diminish the number of contributories, and increase the liability of those who should remain upon the list. The official manager, however, stated he was ready to adhere to the terms of the compromise with Mr.

(a) 3 H. of L. 341.

Lucy, if the latter so desired. Mr. Lucy acceded to the proposition, and the Master made the following memorandum on the proceedings: "Meeting to consider of proposed compromise, attended by the official manager and his counsel, Mr. Roxburgh, and a great number of contributories or their solicitors, with the general approbation of the contributories present. I approve of the official manager accepting 350*l.*, to be paid forthwith in discharge of all present and future liabilities, of Mr. Lucy, a contributory. — W. H. TINNEY."

On the 7th of July, 1852, the official manager, in pursuance of the arrangement come to before the Master, sent to Mr. Lucy a memorandum of the compromise, with the following letter: "I send you herewith the memorandum of compromise in duplicate, one being for the file of proceeding, the other for you. Please to sign both and return them to me, and upon your remitting the 350*l.* I will give you the release."

The memorandum of compromise was as follows: —

"William Lucy, of Edgbaston, near Birmingham, in the county of Warwick, one of the contributories of the above-named company, has relinquished all and every right, title, claim, and demand which he has or may have or be entitled to, against the said company or the official manager thereof, and has paid to the official manager of the said company, and the official manager of the said company has accepted from the said William Lucy, the sum of 350*l.* as a compromise of any right, title, claim, or demand which the
 * 360 said company, or the official manager * thereof, has or may have or be entitled to against the said William Lucy, as a contributory of the said company as before mentioned, the proposal for such compromise having been previously approved of by WILLIAM HENRY TINNEY, Esq., the Master of the High Court of Chancery charged with the winding-up of the affairs of this company. — Dated this 8th day of July, 1852."

The memorandum of compromise was returned to the official manager, signed by Mr. Lucy, with a letter from him dated the 8th of July, 1852, which was as follows: "If you will have the goodness to apply at the bank of Sir J. W. Lubbock, bankers, they will pay you the sum of 350*l.*, being the amount fixed by Master TINNEY as my contribution to the Midland Union Railway Com-

pany in full of all demands. Have the goodness to acknowledge the receipt. I should be glad to know how the directors have settled their liabilities."

Mr. Lucy went in the evening of the 8th and countermanded the payment under the circumstances mentioned in his affidavit stated below.

On the 19th of April, 1853, the Master made a peremptory order, directing Mr. Lucy, within seven days after service thereof, to pay to the official manager the sum of 350*l*.

The motion was then made, which was the subject of the present appeal, that the order dated the 19th April, 1853, requiring William Lucy, within seven days after the service of the order, to pay to Robert Palmer Harding, the official manager of the company, at the office of the said official manager, at Guildhall Chambers, Basinghall Street, in the City of London, the sum of 350*l*., might be discharged, and that the said William Lucy * might * 361 be at liberty to appeal against the certificate of the Master, whereby the name of William Lucy was placed on the list of contributories.

In support of the motion before the Vice-Chancellor, Mr. Lucy deposed, that on the 5th of July, 1852, he attended a meeting of contributories at the Master's office, to proceed upon the proposals of several of the contributories to compromise their liability, and was on that occasion accompanied by a clerk of his London agents, Messrs. Chaplin and Hilliard, who had previously attended with and for him at several previous meetings in the Master's office; and that he understood the counsel for the official manager to admit that, in consequence of the recent decision of the House of Lords in certain causes of *Hutton v. Bright* and *Bright v. Hutton*, several of the parties who had been put upon the list of contributories upon the authority of *Upfill's Case* were released; but that the appellant and Mr. Leedham, another contributory, were not so released, because the evidence showed that they had done certain acts, as provisional committee men, which prevented them from coming within the operation of *Bright's Case*; and further, that, in consequence of the great reduction of the list of contributories consequent upon that decision, a much heavier amount of liability would be thrown on those who were still retained thereon; but that, if the appellant and Mr. Leedham thought proper to adhere

to the proposals of compromise already made by them, they should be released from all further liability on the terms therein contained. That the clerk of Messrs. Chaplin and Hilliard then applied to the Master for time to consider the proposition; but that, in answer to such request, the counsel for the official manager objected to any postponement, and required an immediate adoption or
 * 362 rejection of his proposition; and further observed (as * the deponent understood), that if it was not forthwith adopted, the parties objecting would have to try the question, which might cost a couple of thousand pounds or more. That the official manager also, immediately after the above observations had been made by counsel, said to the deponent, that he had much better compromise according to his offer, or otherwise he might be fixed with a much heavier sum. That some days previously to the 5th July, he had read the report of *Bright's Case* in the Times newspaper of the 29th June, 1852, and had misunderstood it as a decision confirming *Upfill's Case*; and that, being induced by such misunderstanding, and by the statements and representations of the counsel for the official manager at the meeting before referred to, and under fear of being led into a long and expensive course of litigation, he did at that meeting hastily, and without due consideration, and without previously communicating with the clerk of Messrs. Chaplin and Hilliard, express to the official manager his determination to adhere to his said proposal of compromise, and afterwards informed Messrs. Chaplin and Hilliard's clerk of his having done so. That in coming to that decision the deponent was actuated entirely by the fear and misapprehension aforesaid, and by his belief that, according to the law, he was liable in respect of contracts which he had never made, or joined in making or sanctioning; and that he was surprised into making the said agreement, and had no opportunity of previously seeking the advice of his professional adviser. That the deponent's erroneous impression with respect to *Bright's Case* was not corrected until a late hour in the evening of the 8th July, 1852, after he had posted the proposal of compromise to the official manager, and after he had, on the same day, instructed his banker to pay to the official manager the 350*l*.

* 363 * *Mr. Daniel* and *Mr. Sargent*, for the appellant, cited
 [284]

Bright v. Hutton, (a) *Tanner's Case*, (b) *Longridge v. Dorville*, (c) *Burkitt v. Ranson*. (d)

Mr. Malins and *Mr. Roxburgh*, for the official manager, referred to *Gordon v. Gordon*. (e)

Mr. Sargent, in reply.

THE LORD JUSTICE TURNER. — This is a motion by way of appeal against an order of Vice-Chancellor STUART, refusing a motion to discharge an order of Master TINNEY, by which Mr. Lucy has been ordered to pay 350*l.* The motion before the Vice-Chancellor consisted of two parts, — one to discharge the Master's order directing the payment, the other for leave to appeal from the decision of the Master placing the name of Mr. Lucy upon the list of contributories. The case appears to be this: In November, 1851, according to the law as it then stood, Lucy was liable to be placed as a contributory upon the list, and his name was accordingly so placed on the authority of *Upfill's Case*. It remained there till May, 1852, when a proposal on the part of Mr. Lucy was made that he should pay 350*l.*, having then already paid 100*l.*, and be released from all future liability. That proposition was assented to by the official manager, and ultimately approved of by the Master, on the 5th of July, 1852, at a meeting then held; but in the mean time a case had been decided in the House of Lords, on the 28th of June, 1852, which affected the law upon the question, as laid down in *Upfill's Case*. In that state of things, at a meeting held * 364 on the 5th July, 1852, some of the contributories, who had been put upon the list in November, 1851, were struck off the list, on the ground that the decision in *Bright's Case* had altered the law as laid down in *Upfill's Case*, on the authority of which they had been placed on the list. It was, however, suggested that there was not the same reason for taking Mr. Lucy's name off the list as existed with respect to those parties whose names were taken off; and a doubt was suggested whether he was not liable to continue on the list, notwithstanding the decision in *Bright's Case*. In that state of things Mr. Lucy allowed the agreement or proposal

(a) 3 H. L. Cas. 341.

(b) 5 De G. & Sm. 182.

(c) 5 B. & A. 117.

(d) 2 Coll. 400–403.

(e) 3 Swanst. 400.

originally made to be proceeded with, and further confirmed it on the 8th of July. There matters rested till the notice was given, on behalf of Mr. Lucy, of the motion under appeal.

It seems to me that, whether the agreement of the 5th of July ought, as has been argued, to be held to relate back to the transaction of the 16th of June, so as to render the agreement which was made complete before the decision in *Bright's Case*, or not, there was a question—a doubt—on the 5th of July, 1852, whether Mr. Lucy was or was not entitled to be released from liability on the authority of *Bright's Case*. Mr. Lucy thought there was such a question, and agreed to compromise it. It is now said that there was in truth no such question, and that Mr. Lucy's case falls directly within the authority of *Bright's Case*. Without deciding that point, I think it sufficient to say that Mr. Lucy, when he entered into the agreement, thought, and that all parties then thought, that there was a question. Otherwise no compromise would be good, if it ultimately turned out that there was no doubt upon the point which was made the subject of compromise.

* 365 It is sufficient if the parties *bond fide* consider * that there is a question to be decided between them. (a)

As to the application for leave to appeal, no doubt a case of surprise may be made out which may induce the Court to indulge a party by allowing him, after the time prescribed by the act, to appeal from a decision of the Master. But I do not see that any surprise upon Mr. Lucy is made out. He attended the meeting where the question was suggested. The clerk of his London agent was present, whom he might have consulted on the subject. He either did not think right to do so, or did so, and nevertheless considered it advisable to enter into the agreement. There is no case of surprise established.

The decision of the Vice-Chancellor is, in my opinion, correct. This appeal must be dismissed with costs.

The Lord Justice KNIGHT BRUCE concurred.

(a) See *Naylor v. Winch*, 1 Sim. & St. 565. [1 Story Eq. Jur. § 126; *Good v. Herr*, 7 Watts & S. 253, 258; *Trigg v. Read*, 5 Humph. 529; *Hunt v. Rousmanier*, 1 Peters, 15; *O'Keson v. Barclay*, 2 Penn. Rep. 531; *Holcomb v. Stimpson*, 8 Vt. 141; *Sherman v. Barnard*, 19 Barb. (N. Y.) 291.]

* CHAPMAN v. GILBERT.

* 366

1853. June 25. Before the LORDS JUSTICES.

A testator by his will desired that his wife might reside during her widowhood in the freehold house in which he dwelt. After directing his business to be carried on by his executrix (who was his wife) and his executors, so long as they thought expedient, he gave the house, stock in trade, and the residue of his property to his executrix and executors, upon trust to pay the wife an annuity of 20*l.* so long as the business should be carried on; and when his youngest child attained twenty-one, to sell the business, stock, and effects, together with the house, and out of the proceeds to pay the wife during her widowhood an annuity of 54*l.* 10*s.* instead of one of 20*l.*, and subject thereto trusts were declared for the benefit of the children. *Held*, that the widow's right to reside in the house ceased upon the sale.

THIS was a motion on behalf of Henry Gilbert, a legatee, who, under the new practice, had been served with a decretal order of Vice-Chancellor WOOD, made in a legatee's suit on the 28th of January, 1853. The motion was that the order and a declaration therein contained might be discharged or varied.

The question arose upon the will of William Gilbert, which after directing an inventory to be made of the testator's stock in trade, household goods and furniture and other effects, and the payment of the testator's debts, and funeral and testamentary expenses out of his personal estate, proceeded as follows:—

“ And my will is, that my wife shall and may reside in the house wherein I now (or at the time of my decease shall) dwell, in case she shall think proper so to do, and shall and may have and enjoy the use of all my furniture, plate, linen, china and glass which shall be therein at the time of my decease, for and during her life, if she shall so long continue my widow and unmarried, but not otherwise: And whereas I have for several years past carried on the several businesses of an ironmonger and a whitesmith at Tunbridge Wells aforesaid, and I am desirous that the same should be continued after my decease, for the benefit of my wife and children, in manner hereinafter mentioned: Now, therefore, I do hereby give and bequeath * my said businesses of an * 367 ironmonger and whitesmith, and all my interest therein, and all my stock and effects now or hereafter to be employed

therein, and all moneys and debts which shall belong and be due and owing to me at the time of my decease for or on account of the said business ; and I also devise all that messuage or tenement in which I now dwell, together with the work and other shop or shops and warehouses and other hereditaments belonging thereunto unto my said wife, my son John Gilbert, and my brother-in-law George Stent, now or late of Hillenden, near Uxbridge, in the county of Middlesex, gardener, and to the survivors and survivor of them, and to the heirs, executors, administrators, and assigns of such survivor, upon or for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, and declarations hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they my said trustees and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, may and shall carry on, manage, and conduct the said businesses until my youngest child shall attain the age of twenty-one years ; and for that purpose I declare that they, he, and she the said trustees or trustee for the time being shall have the fullest powers over the said businesses which I can give them, him, and her, to carry on, manage, and conduct the same businesses, in the same manner, to all effects, constructions, and purposes, as I myself could do if I were living and acting therein: And I do hereby declare that during such time as the said businesses shall be carried on by the said trustees or trustee for the time being, in pursuance of this my will, they, he, or she shall stand and be possessed of and interested in the same businesses, stocks, effects, moneys, debts, messuage or tenement, work and other shops, warehouses, and premises, and the profits to arise from the

* 368 same, upon and for the * trusts, intents, and purposes, and with, under, and subject to the powers, provisos, and declarations to which the said trustees or trustee for the time being would, in pursuance of this my will, stand and be possessed of and interested in the moneys to arise from the sale of the said businesses and premises, and the stocks, funds, and securities in which the same shall be invested as hereinafter mentioned, and the interest, dividends, and annual produce thereof in case the said businesses and premises were sold immediately after my decease, or as near thereto as circumstances will permit: Provided always, and I do hereby direct that during such time as the said businesses shall be carried on by the said trustees or trustee for the

time being, in pursuance of this my will, my said son John shall always be employed therein, and the same shall be carried on, managed, and conducted with his advice and assistance: and after my youngest child shall have attained the age of twenty-one years, and until the said businesses, stocks, and effects, messuage or tenement, work and other shops, warehouses and premises shall be sold by virtue of this my will, shall, with and out of the profits to arise from businesses, allow and pay him, my said son John, such annual sum, not exceeding 50*l.*, by quarterly payments, to commence and be computed from the time of my decease, for his trouble, as the said trustees or trustee for the time being may think proper: Provided also, and I do hereby further direct, that during all such time as the said businesses shall be carried on as aforesaid, my said wife shall yearly and every year receive and be paid out of the said profits, by my said trustees or trustee for the time being, the sum of 20*l.* by quarterly payments, to commence and be computed from the time of my decease, to and for her own use and benefit, in case she remains my widow and unmarried, but not otherwise: Provided also, and I do hereby further declare, that it shall be lawful for the said * trustees or trustee for * 369 the time being to discontinue the said businesses at any time whilst the same shall be carried on by them, him, or her in pursuance of this my will: But in case the said businesses shall not have been previously discontinued by my said trustees or trustee for the time being, then I direct, that when and so soon as my youngest child shall attain the age of twenty-one years, the said trustees or trustee for the time being shall offer to sell either by public auction or private contract, as they, he, or she shall think proper, for such price in money and in such manner as the said trustees or trustee for the time being shall think fit, my said businesses and all my interest therein, and all the stock and effects for the time being employed therein, together with all that messuage or tenement wherein I now dwell, and the work and other shops, warehouses and premises for the time being employed in or connected with the carrying-on of the said businesses."

Then followed the usual clauses, enabling the trustees to enter into contracts and give valid receipts.

The trusts of the moneys to arise by sale of the businesses and of the testator's messuage or tenement, shops, warehouses, and

buildings, and all other moneys which should come into the possession of the trustees, by virtue of the will, after directions for investment, were as follows: "Upon trust that they the said trustees or trustee for the time being do and shall, after the said businesses shall be given up and during such time as my said wife shall continue my widow and unmarried, with and out of the said trust moneys, stocks, funds, and securities, levy and raise the annual sum of 54*l.* 12*s.*, free from all deductions whatsoever, and pay the same to my said wife or her assigns, by equal * 370 quarterly payments in every * year in lieu of and instead of the annual sum of 20*l.* before mentioned, and which she will be entitled to receive and already provided for by this my will." And the testator declared that, subject and without prejudice to the payment of the said annual sum of 54*l.* 12*s.*, the said trustees and trustee for the time being should stand and be possessed of and interested in the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, in trust for his children, except one daughter as therein mentioned.

By the decretal order under appeal it was declared that the widow was entitled to reside in the house during her life, if she should so long continue his widow and unmarried, but not otherwise; and it was also declared that she was entitled to the annuity of 54*l.* 12*s.* during her life if she should continue the testator's widow and unmarried, but not otherwise; and it was ordered that the house should be sold, subject to the right of the widow to reside therein, as thereinbefore declared, with liberty for any of the parties to bid at such sale, or to make proposals to purchase the said house by private contract.

Mr. Rolt and *Mr. Lewis*, in support of the motion. — Upon the whole will, the intention is clear to give the widow the increased annuity of 54*l.* 10*s.* in satisfaction of the annuity of 20*l.* and the right to reside in the house. The testator could not have intended that the house should be sold, subject to a right in the widow to reside in it during her life. Such a sale would be a very improvident one, if it were practicable. The scope of the will shows that the whole interest in the property, including the house, furniture, and effects, was intended to be sold on the youngest son's attaining twenty-one.

* *Mr. Walker* and *Mr. Goodeve*, for the widow. — The * 371 direction that the widow should reside during her widowhood is positive and unqualified, and cannot be controlled by anything less clear. But in fact there is nothing in the will irreconcilable with this gift, and the only argument against it is one founded on mere conjecture. The sale may well be made, subject to the widow's right of residence, which perhaps may not interfere with the business being carried on upon the premises. Without entering into that question, it is sufficient that the two directions are not irreconcilable, the rule being that all the clauses of a will must be reconciled, if possible.

They referred to *Williams v. Evans*, (a) *Thornhill v. Hall*, (b) *Davies v. Davies*, (c) *Bacon v. Clerk*. (d)

Mr. W. M. James, for the plaintiffs.

THE LORD JUSTICE KNIGHT BRUCE. — This will is inartificially drawn, and has many superfluous words. But from it I collect the testator's intention to have been, that as soon as the youngest son should attain twenty-one, the property should be sold, disencumbered from any interest in the widow, whether married or unmarried. I have less difficulty than I should otherwise feel in differing from the Vice-Chancellor, because the question does not appear to have been so fully argued before him as it has before us.

THE LORD JUSTICE TURNER. — It is the duty of the Court to find out from the whole will what was the testator's intention. That intention * appears to me to have been, that the right * 372 of the widow to reside in the house should be determinable on the period of sale arriving.

The order was varied by declaring that the widow was not entitled to reside in the house after the sale, and directing the sale to be made of the fee-simple in possession. Costs of all parties to be costs in the cause.

(a) 1 Ell. & Bl. 727.

(b) 2 Cl. & Fin. 22.

(c) Daniel, 84.

(d) 1 P. Wms. 478.

BETWEEN

WILLIAM PENNELL, one of the Official Assignees in Bankruptcies prosecuted in her Majesty's Court of Bankruptcy on behalf of himself and all Assignees of Bankrupts and Insolvents and other persons as having been Partners with Bankrupts interested in the Moneys or Funds sought to be recovered in this Suit, or any part thereof, Plaintiff;

AND

HENRY DEFFELL and HARRIET SUSANNAH DEFFELL,
Defendants.

1853. June 23. July 16. Before the LORDS JUSTICES.

When a trustee pays trust money into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository, and so remained; and the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money, in every sense his own.¹ But checks drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed and affect the account in the mode explained and laid down in Clayton's Case, 1 Mer. 572.

THIS was an appeal from the decision of the Master of the Rolls, upon exceptions and further directions. The suit was supplemental to one for the administration * of the estate of
* 373 George Green, deceased, late one of the official assignees of the Court of Bankruptcy, who died on the 22d of October, 1849, intestate. The defendants were his administratrix and her husband.

Mr. Green had been appointed official assignee shortly after the establishment of the Court of Bankruptcy; and on the decease of Mr. Follett (another official assignee), which took place on the 9th of June, 1849, Mr. Green was appointed to be the official assignee in all the bankruptcies in which Mr. Follett was at the time of his death the official assignee.

¹ Lewin Trusts (5th Eng. ed.), 242, 245-247; Ernest v. Croysdill, 2 De G., F. & J. 175; Mayor of Berwick-upon-Tweed v. Murray, 7 De G., M. & G. 497; Collinson v. Lister, 7 De G., M. & G. 634, 645, 646; Hill Trustees (3d Am. ed.), 554 and note (1); *In re European Bank*, L. R. 5 Ch. Ap. 358, 362.

Mr. Green continued to be such official assignee until the time of his death, when the plaintiff was appointed to be an official assignee in bankruptcies prosecuted in the Court of Bankruptcy, in the place of Mr. Green; and in particular the plaintiff was appointed to be the official assignee, and to act as such, in all the bankruptcies in which Mr. Green was at the time of his death the official assignee.

Mr. Green was originally attached to the Court of Mr. Commissioner MERIVALE, who died in the year 1844, and was succeeded by Mr. Commissioner GOULBURN. From that time Mr. Green during his life, and afterwards the plaintiff as the successor of Mr. Green, were successively attached to the Court of Mr. Commissioner GOULBURN.

On his first appointment to be such official assignee, Mr. Green opened in his own name a banking account with the Bank of England, into which account he paid all the moneys he received, whether moneys received by him as such official assignee or his own private moneys; and he continued such account until the promulgation of * the order in bankruptcy of the 12th * 374 of November, 1842. (a)

Immediately after this order was promulgated, Mr. Green set apart his banking account at the Bank of England as the banker's account to be kept by him as official assignee in obedience to the

(a) The following are the material sections of the order: —

13. That no official assignee shall keep under his control upon any one estate more than 100*l.*, or, in the aggregate of moneys of bankrupts' estate, more than 1000*l.*, and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

14. That the official assignee, at the time of paying any moneys into the Bank of England, shall state in writing, delivered therewith to the cashier of the bank, in the form specified in the schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the accountant in bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the bank, and on the same day carry or transmit it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt or bankrupts in the books kept in the office of the accountant in bankruptcy; such voucher to be produced when called for by the Court.

15. That all moneys without exception received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the account-

15th section of the order ; but as the Bank of England will not open a banking account with an individual as a trustee, or in any character qualifying his absolute title, Mr. Green was permitted by the commissioners to keep his account at the Bank without such account being headed “ as official assignee.”

* 375 * By the decree dated the 7th of December, 1850, it was referred to the Master to inquire and state whether any or what balances or balance were or was, at the decease of Mr. Green, due from him to any and which of the bankrupt's estates of which he was at his decease the official assignee, and what was at his decease the aggregate amount of all such balances, if any, and whether any and what balances or balance, if any, were or was at the decease of Mr. Green due to him from any and which of the bankrupt's estates of which he was at his decease the official assignee, and what was at his decease the aggregate amount of all such balances, if any, and the Master was to inquire and state whether any and what balances or balance were or was at the time of the decease of Mr. Green due from him. Similar inquiries were directed with respect to partnerships, the assets of which were received by him, where any of the members of such partnerships were or was bankrupts or a bankrupt ; and also as to insolvents' estates of which he had been official assignee under the then existing law. An inquiry was also directed as to what balances were standing to the credit of Mr. Green in his banking accounts with the Bank of England and with the London Joint-stock Banking Company respectively, and from what or whose funds or moneys the same balances arose respectively, and under what circumstances the same were so standing to his credit with the said banks ; but the several inquiries thereinbefore directed were to be without prejudice to the rights of any of the parties and to any question in the cause.

The Master, by his report, dated the 10th of January, 1853, found to the effect of the foregoing statement, and set forth the accounts of Mr. Green with the Bank of England and the London Joint-stock Banking Company, the former upon the 30th of

ant in bankruptcy, shall be paid by the official assignee, as soon as they shall amount to 100*l.*, into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled as official assignee, and in which account no moneys shall be entered except such as are received by the official assignee in his official capacity.

September, 1849 (the date * of making up his last quarterly * 376 account), and the latter from the 31st of December, 1848, to the day of his death, in each case.

The former account was as follows :—

Dr. THE BANK OF ENGLAND, in Account with MR. GEO. GREEN.				Cr.			
1849.		£	s. d.	1849.		£	s. d.
	To balance agreed	648	8 8	Oct. 8.	Hartley	8	0 0
Oct. 8.	Sundries	199	15 0	4.	Atkinson	6	5 0
„	Ditto	20	8 5	„	G. Assurance Co.	8	5 0
4.	Ditto	180	19 0	„	Cantrice	57	10 0
5.	Post Office	2	12 0	„	Carter	25	0 0
„	Sundries	512	16 8	„	Campbell	15	14 2
8.	Cash	7	0 0	„	Self	10	0 0
9.	Sundries	97	15 2	5.	Cutten, Broker	21	18 4
12.	Same	829	8 4	„	Upton	18	18 0
				„	Inglis	28	4 6
		1998	17 5			199	10 0
17.	Sundries	87	6 0	8.	Hastings	25	0 0
18.	Ditto	126	7 0	„	Paterson	6	15 2
		2162	10 5	9.	Campbell	10	0 0
22.	Sundries	180	0 0	10.	Reeves	8	8 8
„	London and County	44	15 2	11.	Gill	50	12 9
23.	Challis	121	7 0	„	Adamson	4	4 10
						304	6 5
				15.	Office	81	5 0
				18.	Returned draft	121	7 0
						456	18 5
				20.	Miss Fox	18	2 6
						470	0 11
				Balance		1988	11 8
		£2458	12 7			£2458	12 7

With respect to this account, the Master found that the whole of the moneys respectively paid into and drawn out after the 30th of September, 1849, were moneys respectively received by him in his official capacity, with the following exceptions only, viz., that 72l. 16s. 3d., part of the above-mentioned sum of 512l. 16s. 3d. paid in on the 5th of October, was received by him on his private account; and several sums of 6l. 5s., 8l. 5s., * 57l. * 377 10s., 25l., 10l., 18l. 18s., 25l., 6l. 15s. 2d., 31l. 5s., and 13l. 2s. 6d., making in the whole 202l. 0s. 8d., were drawn out and applied by Mr. Green on his private account, so that during the period

With respect to the item 79*l.* 8*s.* similar circumstances were stated. The item 219*l.* 0*s.* 6*d.* was found by the Master to be composed of 50*l.* received by Mr. Green on account of Denvon's estate, and 169*l.* 0*s.* 6*d.* received on account of another estate, all paid in the first instance into the account at the Bank of England, but drawn out by a check for 219*l.* 0*s.* 6*d.*, and paid to his account with the London Joint-stock Banking Company. The item 1627*l.* 15*s.* 8*d.* was composed of balances received by Mr. Green from the executors of Mr. Follett and from various bankrupts' estates, similarly paid in the first instance into Mr. Green's account at the Bank of England and subsequently transferred to his account with the London Joint-stock Banking Company. The Master therefore found that the balance or sum of 2174*l.* 0*s.* 10*d.* standing to the credit of Mr. Green on his account with the London Joint-stock Banking Company arose to the extent of 2088*l.* 14*s.* 8*d.*, part thereof, from moneys received by Mr. Green, from and at the date of his death, due to the estates which the report specified; and that the sum of 85*l.* 6*s.* 2*d.*, residue of the sum of 2174*l.* 0*s.* 10*d.*; arose from and formed part of the private moneys of Mr. Green.

To this report the defendant took eleven exceptions, which were allowed by the Master of the Rolls, who, * on * 379 further directions, decided that the balances of both accounts formed part of the general estate of the testator. Against this decision the plaintiff now appealed.

Mr. Roupell and *Mr. Hardy* appeared in support of the appeal.

Mr. Roundell Palmer and *Mr. Rogers*, for the respondents.

The following cases were cited: *Burdett v. Willett*, (a) *Lane v. Dighton*, (b) *Ryall v. Ryall*, (c) *Ex parte Chion*, (d) *Lord Chedworth v. Edwards*, (e) *Lench v. Lench*, (g) *Lupton v. White*, (h) *Taylor v. Plumer*, (i) *Clayton's Case*, (k) *Liebman v. Harcourt*, (l) *Massey v. Banner*, (m) *Gardner v. Rowe*, (n) *Small v. Attwood*, (o) *Grigg v. Cocks*, (p) *Sims v. Bond*, (q) *Ex parte Grib-*

(a) 2 Vern. 638.

(b) Amb. 409.

(c) 1 Atk. 59.

(d) 3 P. Wms. 187, n.

(e) 8 Ves. 46.

(g) 10 Ves. 511.

(h) 15 Ves. 432.

(i) 3 Mau. & S. 562.

(k) 1 Mer. 572.

(l) 2 Mer. 513.

(m) 1 J. & W. 241.

(n) 2 Sim. & St. 346.

(o) 3 Y. & C. 105.

(p) 4 Sim. 438.

(q) 5 B. & Ad. 389.

ble, (a) *Foley v. Hill*, (b) *Manningford v. Toleman*, (c) *Pinkett v. Wright*, (d) *Trench v. Harrison*. (e)

July 16.

THE LORD JUSTICE KNIGHT BRUCE. — As in this case (subject to the possible effect on our minds of a reply if one shall be addressed to us) we have arrived at a conclusion which practically, so far as the particular cause before us is concerned, approaches
 * 380 nearly * that of the Master's report, we have thought it right now to state our present opinions; and in the event of the plaintiff's leading counsel desiring, after hearing these, to reply, he shall be attentively listened to, if not on this day on some other that may suit him better. Nor need we assure him of our readiness to own if he shall effect a change in our views. The matter stands thus: —

The late Mr. George Green, as an official assignee in bankruptcy, or in that character and otherwise, was a trustee for various persons and purposes. The trusts thus reposed in him were many, and the persons interested respectively in them numerous.

In the course of their performance he received from time to time on account of them respectively various sums of money, for which, not having discharged himself of them in his lifetime, he was accountable at his death.

He employed two banking establishments as his bankers, one the Bank of England, the other the London Joint-stock Banking Company. With each severally he had but one account, and in each instance the account was kept with him as a private man merely, without any official designation, without any title of a trust, without any thing to mark that he was not alone interested in the amount for the time being due to him upon it. On the account with the Bank of England there was a balance in Mr. Green's favour at his death of 1988*l.* 11*s.* 8*d.* On the account with the London Joint-stock Bank there was a balance then in his favour of 2174*l.* 0*s.* 10*d.* He died on the 22d of October, 1849.

Soon afterwards it was alleged against his executors, but dis-

(a) 3 D. & C. 339.

(c) 1 Coll. 670.

(b) 1 Ph. 399; 2 H. L. Cas. 28.

(d) 2 Hare, 120; S. C. on Appeal, *nom.* Murray v. Pinkett, 12 Cl. & Fin. 764.

(e) 17 Sim. 111.

puted by them, that of these two sums the whole * of the * 381 former and the greater part of the latter belonged specifically to the trusts that I have mentioned, exclusively of his general creditors. Hence arose this suit, instituted in a form not under the circumstances incorrect, on behalf of the several persons interested in those trusts; the points raised being, whether the whole or any and what part of the balance at the Bank of England, and the greater or some and what part of the balance at the London Joint-stock Bank do in truth belong specifically to the trusts, it being certain that Mr. Green was, at his death, accountable to the trusts in the aggregate for an amount equal to the amount claimed, or for more.

The Master, upon a reference to him, has found certain facts. It is admitted, on each side, that some at least of the facts so found are accurately found and true; and the only question is, what are the just inferences from the undisputed facts,—what are their legal or what their equitable consequences? In order to answering this question, it will be convenient, in the first place, to suppose certain cases, and come to a conclusion upon them. Thus, let me suppose that the several sums for which, as I have said, Mr. Green was accountable at the time of his death, had been (that is to say, that the very coins and the very notes received by him on account of the trusts respectively had been) placed by him together in a particular repository—such as a chest—mixed confusedly together as among themselves; but in a state of clear and distinct separation from every thing else, and had so remained at his death. It is, I apprehend, certain, that after his death the coins and notes thus circumstanced would not have formed part of his general assets, would not have been permitted so to be used; but would have been specifically applicable to the purposes of the trusts on account of which he had received * them. Suppose the case that I have just suggested to be * 382 varied only by the fact, that in the same chest with these coins and notes Mr. Green had placed money of his own (in every sense his own), of a known amount,—had never taken it out again,—but had so mixed and blended it with the rest of the contents of the chest, that the particular coins or notes of which this money of his own consisted could not be pointed out,—could not be identified. What difference would that make? None, as I apprehend, except (if it is an exception) that his executors would

possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors as representing the general creditors on the other.

Let it be imagined that in the second place supposed, Mr. Green, after mixing the known amount of money of his own with the trust moneys, had taken from the repository a sum for his own private purposes, and it could not be ascertained whether in fact the specific coins and notes, forming it, included or consisted of those or any of those which were, in every sense, his own specifically, what would be the consequence? I apprehend that, in equity at least, if not at law also, what he so took would be solely or primarily ascribed to those contents of the repository which were in every sense his own. He would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right; and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible. If these propositions, which I believe to be
 * 383 * founded in principle, and supported by authorities cited during the argument as well as by others, are true, can the plaintiff be wholly wrong in his actual contention? I apprehend not.

In the first place, we are not embarrassed with any statutory question of order and disposition or reputed ownership. Such considerations are out of the case. In the next place, there is here no dispute with either of the two banking establishments,—each is indifferent to the contest; nor is there any dispute among those whose interests are represented by the plaintiff. The controversy is merely between them (agreeing and acting together) on one side, and the executors as representing the general creditors of Mr. Green on the other; nor do the executors deny that if the plaintiff is wholly wrong in his specific claim, those whose interests he represents are general creditors of Mr. Green for an amount equal to the balance at the Bank of England, and a further amount equal to as much as the plaintiff claims of the balance at the other bank. When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not

marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained: that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on one hand and the trust on the other. Whether the *cestuis que trustent* are bound to take to the debt, whether the deposit was a breach of trust, is a different question.

* This state of things would not, I apprehend, be varied * 384 by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own. It may be, however, and as I think is true, that checks drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed and affect the account in the mode explained and laid down by Sir W. GRANT, in *Clayton's Case*. The principles there stated would, I conceive, be applicable, notwithstanding the different nature and character of the sums forming together the balance due from the bank to the trustee, whatever the purposes and objects of the checks. Supposing, however, the bank to apprise the customer, or the customer to apprise the bank, contemporaneously or with due despatch of an intention to ascribe and apply a check, in a manner out of the ordinary course, that, possibly, might make a difference or raise a question, but a difference not here material, for not here existing, nor a question here arising. For the actual circumstances of the present case are thus: With regard to the balance at the Bank of England, the account with that establishment may, for every present purpose, be considered as commencing, on one side, with the sum of 648*l.* 3*s.* 3*d.* credited to Mr. Green on the 30th of September, 1849, which was clearly trust money; and, on the other, with the 8*l.* debited to him on the 3d of October following. That and the sums afterwards debited to him in the account appear to amount together to 470*l.* 0*s.* 11*d.*, and must, I am apprehensive, be considered as general and not expressly appropriated drafts, and, upon the principle of *Clayton's Case*, be set against and accordingly reduce the 648*l.* 3*s.* 3*d.* as the earliest item of credit. The consequence is, I think, that a sum of 72*l.* 6*s.* 3*d.* mentioned in the report, being the only part of the items

of credit which, not specifically belonging to some trust, was in every sense Mr. Green's own, must be deducted in

* 385 *favour of the defendants from the balance of 1988*l.* 11*s.*

8*d.* so as to leave of that only 1916*l.* 5*s.* 5*d.* applicable specifically to the demands of those or some of those whom the plaintiff represents on the record.

With respect to the balance at the bank of the London Joint-stock Banking Company, the account with that company may, for every purpose at present material, be considered as commencing on one side with the item of 642*l.* 15*s.* 7*d.*, standing to Mr. Green's credit at the end of the year 1848 ; and, on the other, with the 89*l.* 11*s.* 3*d.* debited to him on the 11th of January, 1849. That, and the other items of debit against him, appear to be general drafts, and to amount together to 796*l.* 4*s.* 7*d.*, from which sum being deducted the 642*l.* 15*s.* 7*d.*, the earliest item of credit, there remains an amount of 153*l.* 9*s.* 0*d.* to be applied in reducing the 210*l.* forming the second item of credit, by which means that item becomes diminished to 56*l.* 11*s.* 0*d.*, and that sum of 56*l.* 11*s.* 0*d.* the plaintiff is not, and the defendants are specifically, entitled to. So likewise the 2*l.* 1*s.* 10*d.* and the 20*l.* belong to the defendants, and not to the plaintiff. But to the residue, namely, to 2095*l.* 8*s.* 0*d.* of the balance of 2174*l.* 0*s.* 10*d.*, the plaintiff is, I apprehend, entitled specifically against the defendants, upon the unquestioned facts found by the report.

The Master's conclusions, therefore, are practically, I conceive, to be but slightly departed from ; and I have said to what extent. As to the exceptions, I had rather neither allow nor overrule any of them, but make upon them and the further directions the declaration and order proper to be made.

It has been urged, that to assent to Sir G. ROSE's conclusions in any degree, whether practically or theoretically, * 386 * will be to contravene some expressions of opinion attributed, and probably with correctness attributed, to Lord ELDON in the case of *Massey v. Banner*. (a) I am not, however, satisfied that those expressions ought to be understood and applied as the counsel for the defendants here have contended. Certainly, I may assert my belief of this, that had the present cause been before that most eminent Judge, in the circumstances in which it

(a) 1 J. & W. 241.

is before us, he would have decided it as I have stated that in my opinion it ought to be decided. Had I thought otherwise, I should, to say the least, have hesitated much and long before concluding to any extent in the plaintiff's favour, — well knowing how very little is the chance that a man has of being right who, on a point of law or equity, differs from Lord ELDON.

• THE LORD JUSTICE TURNER. — George Green, the testator, whose estate is in the course of administration in this suit, was official assignee under several bankruptcies, and was also assignee or trustee under several insolvencies and of several partnership estates, in cases in which one or more, but not all, the partners had become bankrupt. He died on the 22d of October, 1849. William Pennell, the plaintiff in this suit, has succeeded him in all or most of his offices of assignee and trustee, and he claims to be entitled to certain balances which at the time of Green's death were standing to his credit in account with his bankers, upon the ground that such balances belonged to estates of which Green was and the plaintiff now is assignee or trustee. No objection was made to the title of the plaintiff to maintain this claim, and after the decision of Lord COTTENHAM * in *Green v. Wes-* * 387 *ton*, (a) I think that such an objection, if made, could not have been supported.

The testator George Green had two banking accounts; one with the Bank of England, the other with the London Joint-stock Bank. To each of these accounts he was in the habit of paying in moneys belonging to the estates which he represented, and also moneys which belonged to himself individually; and upon each of these accounts he was in the habit of drawing, both on account of the estates which he represented, and on his own private and individual account. Upon each of these accounts there was a balance in his favour at the time of his death. In one respect there seems to have been a distinction between the two accounts. The account with the London Joint-stock Bank appears to have contained no receipts or payments on account of estates of which Green was official assignee under bankruptcies; and the account with the Bank of England appears to have consisted mainly of receipts and

(a) 3 M. & Cr. 385.

payments on account of those estates ; but I do not think it necessary to pursue this distinction. It is sufficient for the present purpose to observe, that each of the accounts embraced moneys paid in and drawn out by Green, partly on account of the estates which he represented, and partly on his own private and individual account.

The balance due to Green at the time of his death on his account with the Bank of England amounted to 1988*l.* 11*s.* 8*d.*; and the balance due to him at the time of his death on his account with the London Joint-stock Bank amounted to 2174*l.* 0*s.* 10*d.*;

and these balances form the subject of the present conten-

* 388 tion. Inquiries * having been directed by the decree upon

the subject of these balances, the Master by his report found that the whole of the 1988*l.* 11*s.* 8*d.*, the balance on the Bank of England account, and 2088*l.* 14*s.* 8*d.*, part of the 2174*l.* 0*s.* 10*d.*, the balance on the London Joint-stock account, belonged to the estates represented by Green as assignee or trustee ; but this report having been excepted to, the Master of the Rolls, upon hearing the exceptions, decided that the whole of the 1988*l.* 11*s.* 8*d.*, the balance of the Bank of England account, and the whole of the 2174*l.* 0*s.* 10*d.*, the balance of the London Joint-stock Bank account, belonged to and formed part of the general estate of Green. The conclusion at which the Master of the Rolls has arrived rests upon the ground that the moneys belonging to the estates represented by Green cannot be followed into the banking accounts ; and the first question which we have to consider upon this appeal is, whether that conclusion is well founded.

It is, I apprehend, an undoubted principle of this Court, that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust ;¹ and from this principle I do not understand the Master of the Rolls to have in any degree dissented. Several cases illustrating the principle were cited in the argument, but perhaps it cannot be better illustrated than by

¹ See 1 Lead. Cas. in Eq. (3d Am. ed.) 277 and cases cited.

referring to a case of familiar, almost daily occurrence, — the case of trust moneys employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, * and carries on the trade * 389 with them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock in trade and debts of the partnership. The stock in trade and debts may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital, so continually altered and changed. We have here, I think, the most perfect instance of the extent to which the doctrine of following trust property has been carried by the Court; an instance, too, which exemplifies the difficulties with which the Court has felt bound to grapple for the purpose of carrying out that doctrine, for nothing can be more difficult, nothing more inconvenient, than to follow out such a case to its results.¹

But of course in those cases, as in other cases, the property which is the subject of the trust must in some manner be ascertained; and it is upon this point of the supposed impossibility of ascertaining what portion of the balances at the bankers' belonged to the trust, and what portion to the separate estate of Green, the judgment of the Master of the Rolls in this case has proceeded. These balances, it is said, are derived from two sources, the trust estate and the private estate. How is it to be ascertained what portion of them is derived from one source, and what portion from the other? Is it, I would ask, more difficult to ascertain this than to ascertain what part of the profits of a partnership are to be attributed to the capital of a deceased partner, with the superadded difficulty, perhaps, of portions of that capital having been from time to time drawn out? It may be said, that in the case to which I have referred, the Court has a substratum on which to proceed, — the ascertained * amount of the deceased part- * 390 ner's share; but is there not equally a substratum in the case before us, in the amount of the trust moneys paid into the banking-house? Again, it may be said, that in the case to which

¹ See 1 Lindley Partn. (Eng. ed. 1860) 340 *et seq.*; Collyer Partn. (5th Am. ed.) §§ 548–550, 633.

I have referred there are rules and principles by which this Court is guided, in determining what belongs to the estates of deceased partners,—rules and principles which are not even yet, perhaps, clearly settled and defined; but before we part with this question upon that ground, we must inquire whether there are not also rules and principles by which this Court may be guided in determining what, in such a case as the present, belongs to the trust estate.

In order to test the question, whether it be true that it cannot be ascertained what portion of the balances at the bankers' belonged to the trust estate, let us simplify the case. Suppose a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust account, and pays in no other moneys, could it for one moment be denied that the moneys standing to the account of the debt due from the bankers arising from the moneys so paid in, would belong to the trust and not to the private estate of the trustee? Then suppose the trustee subsequently pays in moneys of his own, not belonging to the trust, to the same account. Would the character of the moneys which he had before paid in—of the debt which had before accrued—be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out part of the trust moneys which he has before paid in, would the remainder of those moneys, and of the debt contracted in respect of them, lose their trust character? Then can the circumstance of the account consisting of a continued series of moneys paid in and drawn out alter the principle? It may indeed increase the * 391 difficulty of ascertaining * what belongs to the trust, but I can see no possible ground on which it can affect the principle.

We must see, however, whether the law does not furnish the means of meeting even the difficulty arising from such a continued series of moneys paid in and drawn out. I think that it does. I take it to be now well settled, that moneys drawn out on a banking account are to be applied to the earlier items on the opposite of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted.¹ If that

¹ This principle is by no means limited to bankers, but is applicable to all accounts. See 1 Story Eq. Jur. § 459 *b*, and cases in note to this point; *Thurlow v. Gilmore*, 40 Maine, 378, 380; *Chitty Contr.* (10th Am. ed.) 832 and [306]

debt arose from trust moneys paid in by the customer, so much of those trust moneys is paid off, and, unless otherwise invested on account of the trust, falls into the customer's general estate and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the banker arose from the customer's own moneys paid in by him, that debt is *pro tanto* discharged, and the trust moneys subsequently paid in remain unaffected. The same principle runs through the whole account; each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled.

These are the principles which, in my opinion — concurring fully in that of my learned brother — are to be applied to such a case as the present. They are plain and simple, and furnish, as it seems to me, a ready solution to all the difficulties which can present themselves. They are the principles which govern all other accounts, and I can see no reason why they should not be held applicable to the accounts before us.

* I cannot, therefore, concur in the conclusion at which * 392 the Master of the Rolls has arrived, that these balances belong wholly to the estate of Green. With deference to the Master of the Rolls, I do not think that the case of *Massey v. Banner*, (a) on which he has mainly relied, supports the conclusion at which he has arrived. That case, as I understand it, establishes no more than this, that a trustee who pays in moneys to his own account at his bankers' is liable to his *cestuis que trustent* for the

note (g); *McKenzie v. Nevius*, 22 Maine, 138; *Miller v. Miller*, 23 Maine, 24; *Fairchild v. Holly*, 10 Conn. 176; *Smith v. Lloyd*, 11 Leigh, 518; *Dows v. Morewood*, 10 Barb. (N. Y.) 183; *United States v. Bradbury*, Davies, 146; *United States v. Kirkpatrick*, 9 Wheat. 720; *Postmaster-General v. Furber*, 4 Mason, 336; *Baker v. Stackpoole*, 9 Cowen, 435; *Gass v. Stinson*, 3 Sumner, 98. There are, however, exceptions to this rule referable to the peculiar circumstances or the equities of each particular case. See *Logan v. Mason*, 6 W. & Serg. 9; *Capen v. Alden*, 5 Met. 272; *Upham v. Lafavour*, 11 Met. 174. If an agent, having blended a demand due to his principal with one due to himself, receives a general remittance from the debtor, it will be applied towards both debts in proportion. *Barrett v. Winslow*, 2 Pick. 123; *Cole v. Trull*, 9 Pick. 325; *Scott v. Ray*, 18 Pick. 361.

(a) 1 Jac. & W. 241.

moneys which he has so paid in, as he well may be. He has no right to mix the trust moneys with his own, or to subject his *cestuis que trustent* to the difficulty of separating them. It is one thing, however, to say that the trustee is liable for moneys so paid in, and another that the *cestuis que trustent* are not entitled to the benefit of separating the trust moneys, if it be in their power to do so. The case indeed contains some observations, which, as I read them, are in direct opposition to the conclusion of the Master of the Rolls. Thus Lord ELDON says, (a) "See what the consequence is: If he had paid the sums in question to the account of his sister's estate, and the bankers had then become bankrupts, undoubtedly the trustees would have been entitled to prove the sum against them. Even now that it is standing in his name, the trustees might be entitled to prove it, by his confession, that it belonged to his sister's estate, and then they would be in the same situation." If this right of proof would exist upon the admission of the trustee, it can hardly, I think, be said that it could not be established by evidence against him in a case where there is no bankruptcy, and therefore no question of order and disposition.

The case of *Foley v. Hill* (b) was also relied upon on * 393 * the part of the respondents, but that case again is perfectly distinct from the present. The question there was between the banker and the customer, not as in the present case between the customer and his *cestuis que trustent*. The case establishes merely that the relation of trustee and *cestui que trust* does not exist between bankers and their customers, and does not at all affect the question on which the present case depends; viz., What are the rights of the *cestuis que trustent* of the customer against the customer, their trustee?

These are the grounds upon which I find myself unable to concur in the opinion of the Master of the Rolls. I differ also from the opinion of the Master, and it will be right also to state the grounds on which I differ from his opinion.

The Master's opinion appears by his report to be founded upon this principle,—that the sums drawn out by Green on his private account ought to be attributed to the sums paid in by him on that account, without reference to the order in which the sums were paid in or drawn out, and the case of *Pinkett v. Wright* (c) was

(a) Page 249. (b) 1 Ph. 399; 2 H. L. Cas. 28. (c) 2 Hare, 120.

cited in support of that principle ; but the case of *Pinkett v. Wright*, in which I fully concur, is, I think, materially distinguishable from the present. *Pinkett v. Wright* was the simple case of a person having shares in his own right and also as a trustee, and selling some of the shares, and the Court held that the shares which were sold must be taken to be those to which the party was entitled in his own right. There was no course of dealing, no bankruptcy account, to be considered in the case of *Pinkett v. Wright*. Now Green opened and kept these banking accounts upon the usual footing, and * the plaintiff, taking the benefit of the * 394 accounts, cannot, as I think, be entitled to alter their character. Adopting them for the purpose of establishing his demand against Green's estate, he must, I think, adopt them with all their incidents, one of which is that the moneys drawn out are to be applied to the moneys first paid in. Upon any other footing this consequence would follow, that a debt which had been extinguished at law by the course of payment would be revived in equity by an alteration in that course. Indeed, it would follow that in all cases where trust moneys were paid by a trustee into a bank to his own private account, they must be held to have remained there so long as the trustee may have had moneys of his own in the bank to answer his drafts, whatever may have been the dealings upon the account and however long it may have continued. To apply the principle of *Pinkett v. Wright* to such a case as the present was, in my opinion, an unwarrantable extension of that principle, and certainly it would be attended with the greatest inconvenience.

I may remark, further, that the conclusion at which we have arrived in this case seems to me to be in conformity with the view of Lord ELDON to be collected from the case of *Lord Chedworth v. Edwards*. (a) In that case Lord ELDON, in the first instance, granted the injunction as to the moneys in the bank, but afterwards, upon more mature deliberation, he refused that part of the injunction, and the ground on which he refused it was that the last payment, meaning, as appears clearly by the context, the last payment into the bank, had been made two years ago, thus indicating that had the last payment into the bank been recent, so that it could have been inferred that the moneys remained there, he would have maintained * that part of the injunction * 395

(a) 8 Ves. 46.

also. After this indication of his opinion, I feel no doubt that Lord ELDON would in the case before us have gone at least as far as we have gone. My only doubt is, whether he would not have gone much further. I am therefore also of opinion that this order must be reversed, and that the true result of the case is that which my learned brother has expressed.

TUCKER v. HERNAMAN.

1853. July 18. Before the LORDS JUSTICES.

An uncertificated bankrupt carried on business for several years after his bankruptcy with the knowledge of his assignees and of others who were his creditors at the time of the bankruptcy. He died possessed of considerable property. On a claim filed by one of his executors against the other and the official assignee under the bankruptcy: *Held*, that the creditors subsequent to the bankruptcy were entitled to priority over the former creditors, and that the estate ought to be administered in Chancery.¹

The official assignee, who appealed against a decree to that effect, was ordered to pay personally the costs of the appeal.²

THIS was an appeal from the decision of Vice-Chancellor STUART, reported in the first volume of Messrs. Smale & Giffard's Reports, page 394, where the facts are fully stated. The following is a short summary of them:—

A solicitor named Elswood became bankrupt in 1815, at Chard, in Somersetshire, and never obtained his certificate. In 1817 he went to Bungay, in Suffolk, and practised as a solicitor there till 1852, with the knowledge of some of his creditors, including his assignees. He died in 1852, leaving considerable property, and having made a will. An official assignee, who had recently been appointed under the bankruptcy, claimed the right of distributing the bankrupt's estate among the creditors, whereupon one of the executors, who differed from the other as to the course to be taken,

filed a claim against the latter and the official assignee to
 * 396 have the * assets administered in Chancery, and the Vice-Chancellor, by the order under appeal, declared that the

¹ See *Collins v. Burton*, 4 De G. & J. 612.

² See *Lewin Trusts* (5th Eng. ed.), 283; *Rowland v. Morgan*, 13 Jur. 23.

subsequent creditors were entitled to be paid in the first place out of the bankrupt's estate, and directed accounts to be taken of the real and personal estate of the testator.

The official assignee appealed.

Mr. Bacon and *Mr. Schomberg*, for the plaintiff. — The case is completely governed by the authority of Lord HARDWICKE in *Troughton v. Gitley*. (a) The form of the decree made there shows that the point was actually decided. (b) That case has

(a) Amb. 680.

(b) The following are the terms of the decree from the registrar's book. "10th November, 1766. *Troughton v. Gitley*. His Lordship doth declare that, under all the circumstances of this case, the new creditors of William Kitcatt, subsequent to the time of issuing the commission of bankruptcy against him, are entitled to be preferred in payment out of the assets of the said William Kitcatt, to the old creditors under the said commission of bankruptcy, notwithstanding the said bankrupt's certificate was neither signed or allowed; and doth order and decree that it be referred to Mr. HARRIS, one of the Masters of this Court, to take an account of the personal estate of the intestate, William Kitcatt, come to the hands of the defendant, his administrator, or of any other person by his order or for his use; and that the said Master do also take an account of the said intestate's, William Kitcatt's debts, which have been contracted since the time of issuing the said commission of bankruptcy, and also of his funeral expenses. And it is ordered, that any of the said intestate's creditors, whose debts have been contracted since the time of issuing the said commission, be at liberty to come in and prove such debts before the said Master; and to that end the said Master is to cause an advertisement to be published in the London Gazette, and appoint a peremptory day therein for that purpose; and such of the creditors as shall not so come in and prove their said debts are to be excluded the benefit of this decree. And it is ordered and decreed, that the said intestate's said personal estate be applied in the first place in payment of what shall be found due to such creditors, and of his funeral expenses, in a due course of administration; and if there shall remain any surplus of such personal estate after payment of those debts and the intestate's funeral expenses, it is ordered and decreed that such surplus, to the amount of what remains due to the said William Kitcatt's creditors under the said commission, be paid to the plaintiffs, his assignees, for the benefit of themselves and the other creditors under the said commission; and for the better taking the said accounts, the parties are to be examined upon interrogatories, and are to produce on oath before the said Master all books, papers, and writings in their custody or power relating thereto as the Master shall direct, who, in taking the said accounts, is to make unto the parties all just allowances. And it is further ordered, that all parties be paid their costs of this suit, to be taxed by the said Master, out of the said intestate's said personal estate, and any of the parties are to be at liberty to apply to the Court, as there shall be occasion." B. 1766, Folio 43, T. E.

never been overruled or doubted. It has, on the contrary, been always treated as a binding authority.

* 397 * They also referred to *Ex parte Crew*, (a) *Ex parte Bourne*, (b) *Butler v. Hobson*. (c)

Mr. Rolt and *Mr. J. V. Prior*, for the appellant, the official assignee. — The assets of an uncertificated bankrupt belong to his assignees, and not to his executors, who can have no higher right than himself. Whatever may be the equities according to which the assignee is bound to distribute these assets in the due execution of his trust, that trust is one subject not to the control of the Court of Chancery, but to that of a special jurisdiction constituted for the purpose. The first objection is, therefore, one for want of jurisdiction. *Troughton v. Gitley* (d) is no answer to this objection, for in that case the assignee came into equity, and could not obtain relief without doing equity. Neither against the decision, nor against the dicta in that case, as reported, is it necessary for us to offer any argument. We may admit their correctness. The only

part of the decree which appears to bear upon the present
* 398 * question is expressed in a few words now for the first time brought to light, and probably inserted in drawing up the decree, by consent, or without opposition, or, possibly, by inadvertence. The report is silent on the subject, and shows that Lord HARDWICKE'S attention was not called to the point, and that the decree cannot, in this respect, have the weight of his authority ascribed to it. Even if one of the new creditors might have instituted a suit, the executor of the bankrupt could not. As between an uncertificated bankrupt and his representatives, the Court of Bankruptcy is the sole competent tribunal. If the assignee has a surplus in hand neither the bankrupt nor his representatives can sue for it in this Court, or otherwise than under the jurisdiction in bankruptcy.

In the next place, the declaration as to priority is not correct. It cannot be said that the old creditors stood by and saw the new debts contracted, as in *Troughton v. Gitley*, (d) for the bankrupt absconded; and there is nothing to show that his residence was known to more than three or four creditors, who could not, by

(a) 16 Ves. 236.

(c) 4 Bing. N. C. 290.

(b) 2 Gl. & J. 141.

(d) Amb. 680.

their laches, prejudice the rest. Now the words of Lord CAMDEN, in *Troughton v. Gitley*, (a) are these: "This is the case of a man who has demeaned himself to the satisfaction of his creditors, and, under such behaviour, suffered to trade for four years without interruption or claim. I believe it was the intention of the creditors that he should trade for his own benefit. It is admitted that an agreement in writing by all his creditors to discharge him would have been sufficient, and equal to a certificate. Quære, whether the whole of this transaction is not equal to such an agreement. The assignees meant he should be a restored person. They knew he was to go on in his trade; they took his note, and saw * him give a counter-security; and though the rest of the * 399 creditors were not called together and assented, yet they knew that the bankrupt continued to trade, and that the effects were delivered over to him, and that he was trading with a multitude of persons; and in order to do that, it was necessary he should take as well as give credit." These observations clearly would not apply here.

THE LORD JUSTICE TURNER. — Upon this question I entertain no doubt, though the case is a singular one. The testator, Mr. Elswood, became bankrupt in 1815, and in that year went abroad, after a commission had been issued against him. In 1817 he returned to England, and established himself in a different part of the country. Being a solicitor, he took out his certificate again in 1824, and continued a regularly certificated practising solicitor from 1824 to the period of his death in 1852, evidently carrying on a considerable business, — because we are now discussing the administration of assets left by him amounting to several thousands of pounds. In this state of circumstances the first question which arises is, what are the equities as between the creditors of the testator whose debts were contracted subsequent to the issuing of the commission against him, and which are not provable under the commission, and the other creditors who have proved their debts under the commission? *Troughton v. Gitley* (b) is a clear authority for this, that if the creditors, under a commission in bankruptcy, permit the bankrupt to carry on his trade subsequently to the issuing of the commission, those prior creditors, as in the case

(a) Amb. 682.

(b) *Ibid.* 630.

of a prior mortgagee, standing by and suffering a subsequent mortgage to be made without giving notice of his security, lose their priority in respect of the debts due to them, and that in the * 400 administration of the estate of a bankrupt * so circumstanced, the debts of creditors incurred subsequently to the commission must be paid in priority. It was urged in argument, that in this case the creditors under the commission might not have known of the return of the bankrupt, and of his having recommenced and carried on his business. It is in evidence, however, that after recommencing his business the bankrupt himself paid some of the debts due under the commission and arranged others, and it is not probable but that the creditors who were thus paid had some communication with the other creditors under the commission. Besides, the assignees are trustees for all the creditors under the commission; and it is proved that one of them was actually paid in full, and that the other of them knew of the fact that the bankrupt was carrying on business in another part of the country. In this state of things it is impossible to avoid imputing to the creditors under the commission a knowledge of all the facts.

It was argued by *Mr. Rolt* that this case differed in its circumstances from that of *Troughton v. Gitley*. The circumstances of one case must necessarily, to some extent, differ from those of another; but what we are to look at is, what has been the principle laid down, and in *Troughton v. Gitley* the principle is thus stated by Lord CAMDEN: "It falls within the principle that if a man having a lien stands by and lets another make a new security, he shall be postponed." This case falls within the principle so laid down, and what we have to consider, therefore, is how the principle is to be carried out under the decree of this Court.

It was said that the official assignee ought to be permitted to get in the assets, and that the subsequent creditors ought to apply to the Court of Bankruptcy for the purpose of having their equities worked out in that Court; but the Court of Bankruptcy * 401 can have no jurisdiction * to administer the estate of the bankrupt for the benefit of the creditors subsequent to the commission. These creditors have proved no debts under the commission, and have no rights under it. In this case, moreover, there is this further difficulty, that the executor has actually received and got in assets of the testator to a considerable amount,

and, the assets being thus possessed by him, the decision in *Troughton v. Gitley* fixes him with a trust as regards these assets for the benefit of the subsequent creditors. If he is so fixed with a trust, how can he permit those assets to be handed over to the official assignee to be applied under the commission, under which they could not be administered for the benefit of the subsequent creditors? The difficulty does not stop here. The official assignee has possessed himself of some part of the testator's assets which are subject to the claim of the creditors subsequent to the commission; and the Court of Bankruptcy has no power to administer those assets for the benefit of the subsequent creditors as against the creditors under the commission. By whom, then, are those assets to be administered? By whom, but the executor who represents the creditors generally?

It was said that whatever might be the equity of the subsequent creditors, it was merely a personal equity. But how is this case to be distinguished from that of *Green v. Weston*, (a) before Lord COTTENHAM, to which I referred during the argument? In that case assets of a bankrupt, which had been appropriated to meet dividends which had been declared upon debts proved under the commission, were remaining unclaimed in the hands of an assignee appointed under the bankruptcy at the time of his death; and Lord COTTENHAM held, that although the assets in question had been severed from the estate, and * declared to be the * 402 separate property of particular creditors, yet the official assignee in the bankruptcy could maintain a suit for the recovery of them against the representatives of the deceased assignee. He so held on the principle that the right to administer those assets rested with the official assignee. So in the present case the right to administer the testator's assets for the benefit of the subsequent creditors rests with the executor.

Another contention which was raised on behalf of the official assignee in this case was, that the decree made by the Vice-Chancellor goes too far, that it should have directed merely an account of what is due to the creditors whose debts have been incurred subsequent to the commission, and that, having made that direction, it should have gone on to direct payment of what should be so found due to the subsequent creditors, and have

(a) 3 M. & Cr. 385.

ordered the surplus, after making such payment, to be handed over to the official assignee to be administered in the bankruptcy. But how does this case stand? There is first a trust for the benefit of the creditors whose debts have been incurred subsequently to the issuing of the commission; secondly, there is a trust for the creditors who have proved their debts under the commission; and, thirdly, a trust for the legatees of the testator. If the matter had stopped at the trust for the creditors under the commission, there might perhaps have been ground for this argument of the official assignee. But there being the further trust for the benefit of the legatees, the argument cannot be maintained. It would not be according to the course of this Court to administer the estate piecemeal. The effect of the decree asked by the official assignee would be this,—that the Court would administer a part of the trusts affecting the assets, and then put out of its power the remaining assets, leaving the administration of them to others. That certainly is not the usual course of the Court, nor a course to be adopted if it can by possibility be avoided.

It was said that it was an interference with the jurisdiction of the Court of Bankruptcy to direct an account of what is due to the creditors who have proved under the commission. The Court, however, meddles here with nothing but what the official assignee has wrongfully received, and all that it proposes to do is to ascertain the amount of the debts which have been proved under the commission, and what is to be paid in respect of those debts, and whether any of those debts still remain unpaid. It is the duty of this Court to carry out the administration of the estate, having regard to the ulterior as well as the prior trusts which attach upon it.

The decree, therefore, must contain a declaration that the creditors whose debts have been incurred subsequent to the issuing of the commission are entitled to be paid their debts in priority, and that then Hernaman, as official assignee under the commission, is entitled to be paid out of the surplus assets so much as will be sufficient to satisfy the debts proved or to be proved, so far as they remain unpaid, and any costs which may have been properly incurred under the commission, and which may be remaining unpaid; and there must be an inquiry to ascertain what is due to the creditors who have proved under the commission, and whether any

and what costs properly incurred under it still remain unpaid, and to what amount, and to whom due. Under the inquiry of what is due to the creditors under the commission, it will be competent to the Court to consider whether any thing is due in respect of interest on such debts.

THE LORD JUSTICE KNIGHT BRUCE.—We do not mean now to dispose of the question of interest; * we reserve it, * 404 or keep it alive for the Vice-Chancellor's consideration when the case shall again come before him. The appellant not having succeeded in any point to which the appeal was addressed, my impression is, that he ought personally to pay the costs of the appeal. We do not intend that they should be paid out of the estate.

In the Matter of The ACT 10 & 11 VICT. c. 96; and in the Matter of The Trusts created by the Will of JOHN STULZ deceased, as to a Legacy bequeathed in Trust for CHRISTIAN STULZ.

Ex parte WILLIAM HENRY KINGSFORD AND CHRISTIAN STULZ.

1853. July 19. Before the LORDS JUSTICES.

By a will trustees were directed to pay the income of a trust fund to the testator's nephew for his life, weekly, monthly, or quarterly, as they should think fit, with a declaration that if the nephew should anticipate, assign, or otherwise incumber the income, or attempt so to do, the trust should be void, and the trust fund fall into the residue. Eighteen months after the testator's death and before any payment had been made to the nephew, he assigned as a security (so far as he lawfully could without creating a forfeiture of his interest in the income of the legacy) all money due to him on account of the income, but not any future income: *Held*, that the assignment was valid.¹

THIS was an appeal from the decision of Vice-Chancellor Wood, upon a petition presented under the Trustees Relief Act.

John Stulz, by his will dated the 6th of July, 1848, after ap-

¹ See Lewin Trusts (5th Eng. ed.), 82, 83; 2 Jarman Wills (3d Eng. ed.), 27 *et seq.*

pointing his wife Sophia Stulz, William Wesley, and Edward Clarke his trustees, executrix and executors, gave to his said trustees 2000*l.* upon trust immediately after his decease to invest the same in their names in the government stocks or funds of Great Britain, and to stand possessed of the stocks or funds in or upon which the same should so be invested: upon trust to pay the interest, dividends, and annual proceeds *to arise therefrom

* 405 * unto his nephew, the petitioner Christian Stulz, during his natural life, to be paid to him by weekly, monthly, or quarterly instalments, if the trustees or trustee for the time being of the said will should think it expedient so to do. But the testator declared that the petitioner Christian Stulz should not have any power or authority to anticipate, or otherwise in any manner to assign or incumber the said dividends, interest, and annual proceeds or his interest therein, or any part thereof. And that in case the petitioner Christian Stulz should attempt or endeavour to anticipate, or otherwise assign or incumber, the same trust and bequest thereby created in favour of the petitioner Christian Stulz should thereby become absolutely null and void to all intents and purposes whatsoever; and from and after the decease of the petitioner Christian Stulz, or from and after any such attempt or endeavour on his part to anticipate or otherwise assign or incumber the same dividends and annual proceeds, then the testator directed and declared that his trustees should stand possessed of the said stocks or funds upon and for such and the same trusts, and subject to the like powers, provisos, and conditions, as were thereafter expressed and declared of and concerning his residuary personal estate, being trusts for payment of the testator's debts, funeral and testamentary expenses, and legacies; and after payment thereof for the benefit of Sophia Stulz during her life, and after her decease as she should appoint.

The testator died on the 16th of April, 1849. The grant of the probate of the will was delayed for a considerable time by proceedings in the Ecclesiastical Court.

On the 3d of December, 1850, and before any payment had been made to Christian Stulz of the dividends directed to be paid * 406 to him by the will, and which were * then in arrear, he executed an assignment of that date, made between himself of the one part and William Henry Kingsford of the other part, whereby Christian Stulz, in consideration of 35*l.* and 5*l.* already

paid to him and of the further sums to be advanced as therein mentioned, did, so far as he lawfully could or might without creating a forfeiture of his life estate and interest in the aforesaid legacy, but not further or otherwise, grant, assign, transfer, and set over unto William Henry Kingsford, his executors, administrators, and assigns, all that the debt or sum or sums of money then due and owing to the said Christian Stulz for or on account of the dividends, interest, and annual produce of the said legacy of 2000*l.* bequeathed in and by the wills of John Stulz, deceased, therein recited, or either of them, or any other will or testamentary disposition of the said John Stulz, deceased, or otherwise howsoever in respect of the estate of the said John Stulz, deceased, to which the said Christian Stulz was or might be entitled, but not any future dividend, interest, or annual produce to arise therefrom, together with full power to William Henry Kingsford, his executors or administrators, in his or their name or names, with the name of Christian Stulz, to ask, demand, sue for, recover, receive, and give effectual and final receipts and discharges to all and every persons or person whomsoever for or in respect of the said money and premises. And it was thereby declared that William Henry Kingsford, his executors or administrators, should stand possessed of all and singular the said moneys and premises, upon trust, after payment of the costs, charges, and expenses therein mentioned, to pay, satisfy, reimburse, and indemnify William Henry Kingsford, his executors and administrators, the sums of 35*l.* and 5*l.* then already advanced, and all such further sum and sums of money which might thereafter be paid and advanced by William Henry Kingsford to Christian

* Stulz, with interest thereon respectively after the rate of * 407 5*l.* per cent per annum from the respective times of such payments or advances being made, not exceeding in the whole the amount of the sum or sums of money thereby assigned, and after full payment thereof in trust to pay the surplus, if any, to Christian Stulz, his executors, administrators, and assigns.

Subsequently, as further dividends became due, further deeds were executed by Christian Stulz, framed precisely in the same manner as the deed already mentioned, and charging those further dividends.

The trustees of the will, under the powers contained in the Trustees Relief Act, on the 31st of January, 1853, transferred into Court 2194*l.* 15*s.* 9*d.*, 3*l.* per cent consolidated bank annuities,

and also paid into Court 116*l.* 19*s.* 8*d.* cash for the interest thereon, after deducting money paid on account of legacy duty and property tax.

The legatee and his mortgagee then presented the petition which was now the subject of appeal, praying that out of the stock transferred into Court, 117*l.* 8*s.* 5*d.*, part thereof, might be sold, and the proceeds thereof paid to the petitioner Christian Stulz, and that Christian Stulz might thereout pay the costs of the petition ; and that the dividends, interest, and annual proceeds of the sum of 2194*l.* 15*s.* 9*d.*, 3*l.* per cent consolidated bank annuities, the remainder of the bank annuities, after such sale as aforesaid, might, from time to time, as the same should accrue due, be paid to the petitioner Christian Stulz, during the term of his natural life, or until he should attempt or endeavour to anticipate or otherwise assign or incumber the same.

* 408 * By the order of the Vice-Chancellor, dated the 23d of April, 1853, it was declared that the indenture of the 3d of December, 1850, operated as a forfeiture of the interest of Christian Stulz in the bequest of 2000*l.*, except as to the dividends which prior to the 3d of December, 1850, would have accrued thereon, had the bequest been invested in pursuance of the directions of the will of John Stulz.

Mr. Rolt and *Mr. Prendergast*, in support of the appeal. — The words “or otherwise incumber,” on which the judgment below proceeded, are controlled by the word “anticipate,” and refer to incumbrances *ejusdem generis*, viz., by way of anticipation. Nor could the clause operate as to dividends already due, for the title to these had accrued absolutely, so that the limitation over could have no operation. With respect to the provisions giving a discretionary power to the trustees, if the trustees do not exercise the power, the only result is, that the annuitant will receive the annuity, not weekly or monthly, but at the regular quarter days.

Mr. Teed and *Mr. G. L. Russell*, for the respondents, the residuary legatees. — Even if the circumstances on which the interest was determinable could be restricted to incumbrances by way of anticipation, still these deeds are obvious attempts to evade the terms of the limitation so construed, as appears from the successive instruments which have been executed. But anticipation is

only one of the acts on which the limitation over is to take effect. It is to operate in the event of the legatee's assigning or otherwise incumbering the dividends, or attempting so to do. As he has at all events attempted to assign or incumber the dividends by the deeds, and also by this petition, the * bequest over has * 409 taken effect. The testator intended his trustees to have a discretionary power over the income, an intention altogether defeated if these instruments are valid.

They referred to *Stephens v. James*, (a) *Martin v. Margham*, (b) *Brandon v. Aston*, (c) *Boreham v. Bignall*, (d) *Rochford v. Hackman*. (e)

Mr. Prendergast, in reply, referred to *Salmon v. Dean*. (g)

THE LORD JUSTICE KNIGHT BRUCE. — I do not think that the testator here intended to prohibit or contemplated any dealing whatever with arrears of interest or of income. If that be so, then, as this gentleman has done nothing beyond assigning the dividends and income already due and in arrear at the date of the assignment, there is no forfeiture.

THE LORD JUSTICE TURNER. — I give no opinion upon the question what would have been the effect of an attempt on the part of the testator to preclude his nephew from assigning an interest absolutely vested in him. The question here is, whether the testator has or not made that attempt. Such a construction ought not, I think, to be put upon an instrument without clear words to that effect. Are we then constrained by the language of this will to put such a construction upon it? I think not; but rather that the words lead to a contrary inference. The words are, * "But I hereby direct and declare that the said Christian * 410 Stulz shall not have power or authority to anticipate, or otherwise in any manner to assign or incumber the said dividends, interest, and annual profits, &c." The words "otherwise in any manner assign or incumber" clearly apply to the same subject as

(a) 4 Sim. 499.

(b) 14 Sim. 230.

(c) 2 Y. & C. C. C. 24.

(d) 8 Hare, 131.

(e) 9 Hare, 475.

(g) 3 M. & G. 344.

the preceding word "anticipate," which can only have any force or effect as applying to future dividends. The whole clause is perfectly consistent if it be read as applying to future dividends only.

* 411 * In the Matter of The DOVER AND DEAL RAILWAY, CINQUE PORTS, THANET, AND COAST JUNCTION COMPANY, and of The JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

LORD LONDESBOROUGH'S CASE.¹

1853. July 4. 1854. February 25. Before the LORDS JUSTICES.

The solicitors of a provisionally registered railway company, by the authority of a meeting, consisting of three provisional directors, sent to applicants for shares, with the letters of allotment, a letter stating that, in the event of the act not being obtained, the directors undertook to return the whole of the deposits without deduction. The company was wound up under the Winding-up Acts: *Held*, —

1. That a call was properly made upon the three directors for the whole amount of the expenses and the costs of winding up the company.²
2. That a director who had acted in that capacity after the meeting authorizing the letter of allotment, but before the letter had been sent, and had not objected to it, was not liable to contribute.
3. That a director who had been plaintiff in an action against a stranger, in which the declaration stated the above undertaking to have been given by the directors, and who had been a defendant to a suit in Chancery instituted by the stranger, and had by his answer admitted to the same effect, had not thereby conclusively adopted the undertaking, but might adduce evidence to show that the admission in the answer was made by mistake.
4. That upon an appeal of a contributory from a call, the appellant may show that he ought not to have been placed on the list of contributories.³

THIS was an appeal from a decision of Vice-Chancellor KINDERLEY, affirming a call made on the appellants by the Master in winding up the above company.

The circumstances out of which the question arose are suffi-

¹ See Clifton's Case, 5 De G., M. & G. 743.

² See 2 Lindley Partn. (Eng. ed. 1860) 1138, 1139, 1140.

³ See 2 Lindley Partn. (Eng. ed. 1860) 1141, 1142.

ciently stated in *Mowatt and Elliott's Case*. (a) The meeting of provisional directors, held on the 24th of January, 1846 (at which the letter to the allottees, mentioned in the former report, was sanctioned), was attended by only three of the provisional directors, viz., Lord Londesborough, Mr. Beauclerk, and Mr. Gore, the present appellants.

* After the decision of the Court in *Mowatt and Elliott's Case*, the Master made the call now in question upon the appellants only. * 412

The respondents were others of the provisional directors, but no evidence had been adduced showing that they had sanctioned the resolution of the 24th of January, 1846.

Mr. Bacon and Mr. Hislop Clarke, for the appellants. — The other directors, who might have attended on the 24th of January, 1846, and who never objected to the letter then approved of, although it was advertised in the newspapers and must have been known to them, are as much liable as the appellants; and so are those allottees who paid their subscriptions before the letter was sent or irrespectively of it. At all events the appellants' undertaking did not extend to the costs of these proceedings. In *Tanner v. Woolmer* (b) some of the members of the committee of a projected railway company agreed by deed to indemnify one of their body against the claims mentioned in a schedule to the deed, and from all costs and damages in respect thereof. On the company being wound up, a call was made on the member, as a contributory, to meet one of the claims specified in the schedule and the costs of winding up the company. The Court of Exchequer there held, that the undertaking of the other members did not extend to this call; and Mr. Baron MARTIN said, "The payment which the plaintiff was compelled to make, and in respect of which he now claims to be indemnified, was in respect of the costs and expenses to which he was put by reason of the proceedings in Chancery of Mr. Ellis, and not in respect of any * costs * 413 and expenses to which he was put by reason of the claims mentioned in the schedule to the agreement."

Mr. Glasse and Mr. Selwyn appeared for the official manager.

(a) Reported *ante*, Vol. III. p. 254.

(b) 8 Exch. 482.

Mr. Daniel, Mr. Baily, Mr. Follet, Mr. Goodeve, Mr. Cairns, Mr. Roxburgh, Mr. Mackeson, and Mr. Hobhouse appeared for the other respondents, some of whom were directors and others allottees.

THE LORD JUSTICE KNIGHT BRUCE. — As to one class of those who are substantially the respondents on this occasion we have no doubt, namely, the class who paid their deposits and so became associated with the undertaking in question, on the faith or in consequence of the letter of the 24th of January, which concludes with this passage: “In the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction.”

The effect of that, I think, is, that all the proceedings of the directors, no act having been obtained, were—as between them and the class of shareholders or contributories, or persons paying deposits, whom I have mentioned—at the risk of the directors or some of them, but especially and certainly at the risk of Lord Londesborough, Mr. Beauclerk, and Mr. Gore, alone or otherwise; these three gentlemen having been present at the meeting at which this letter of the 24th of January was authorized. I am of opinion, therefore, that this call cannot be discharged, varied, or modified, for the purpose of bringing any liability on that class of shareholders, contributories, or persons paying deposits, whichever of those designations is the proper one, and I believe it to be clear that there are some who come within that description.

* 414 * It is said—and perhaps accurately said—that there are persons who paid deposits not on the faith or in consequence of that letter. This is not at present established. But we are at present of opinion, subject to any observations that counsel may desire to make on the subject, that the point ought to be left open, so as to enable an application to be made to the Master with respect to it; and that we ought not, in the mean time, on the ground of the pendency of any such question, or rather the possibility of raising any such question, to disturb or interfere with the call made on the three gentlemen on whom alone it stands at present made. Then comes an important point between the three gentlemen, namely, Lord Londesborough, Mr. Gore, and Mr. Beauclerk, on the one side, and the other directors on the other; it is said, perhaps correctly, that the letter of the 24th of

January was extra the usual course of business and of duty, — extra the proper course; and that, therefore, however well intended, the other directors, namely, the directors not present at the meeting at which the letter was resolved upon, ought not to be made liable to the consequences. And it seems a question (subject to any observations that may be addressed to us) not perfectly clear at present one way or the other, whether the other directors or any of them have so acted as to bring themselves within the obligation of this letter, — so acted as to adopt the concluding paragraph of the document.

There is, however, a question still more important that remains, namely, the question whether the directors whom we have not yet heard are liable, even supposing them not affected by this letter, for a considerable portion at least of the costs for which this call has been made; not exclusively liable, but liable, if at all, together with Lord Londesborough, Mr. Gore, and Mr. Beauclerk. Considering that these three gentlemen are certainly * liable, and that the liability of others with them does not * 415 stand at present clearly established, we propose, subject to what we may hear, to leave this question also open to any application before the Master that any person may think proper to make.

We are disposed to dismiss the appeal without prejudice to any question between Lord Londesborough, Mr. Gore, and Mr. Beauclerk on the one hand, and the other directors on the other, and without prejudice to any question between Lord Londesborough, Mr. Gore, and Mr. Beauclerk and the other directors or any of them on the one hand, and such contributories, if any, as have paid their deposits not on the faith nor in consequence of the letter of the 24th of January, 1846, on the other; and to give liberty to any person to proceed before the Master as he may be advised with respect to these reserved questions, reserving also the costs.

THE LORD JUSTICE TURNER. — I concur in the observations made by my learned brother. As to the rights and liabilities of the parties who paid their deposits on the faith of the guarantee, I see no ground on which any of those parties could, in any event, be liable beyond the deposits paid by them. Whether they can be held liable to the extent of the deposits which they paid must depend upon the terms of the letter containing the guarantee.

That letter contains this expression: "In the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction;" an expression which seems to me to intimate distinctly to the persons to whom it was addressed, that they were not to be liable for any costs or expenses which might be incurred, or for any debts which might be contracted, unless the Act of Parliament * should be obtained.

* 416 It amounts, in substance (whatever may be the form of expression), to an agreement that, in the event of there being no act, the parties who paid upon the faith of it shall not be liable beyond the amount of their deposits. It was said that the subscribers' agreement was subsequently signed, and that it extends the liability of these parties. But upon what footing was the subscribers' agreement signed? Upon the footing of the agreement which had been previously entered into. And whatever, therefore, might be the liability at law upon the subscribers' agreement, there would be a right in equity on the part of those who signed on the faith of the previous agreement, to control the legal liability. I feel no doubt, therefore, that the contributories who signed the subscribers' agreement, or became parties to the concern upon the faith of the letter of the 24th January, 1846, cannot, as between them and the directors, be made liable.

At the same time, it not having yet been ascertained whether there were or were not any contributories who did not sign the subscribers' agreement upon the faith of that letter, it is due to the three directors who have been charged with the whole amount of the costs and expenses, and of the debts which have been incurred, that they should not be precluded from any right which they may have against such parties, if any such there are. The point which arises between the three directors on whom the call has been made and the other directors, with reference to the liabilities of those other directors to contribute, depends upon wholly different considerations, and this point does not seem to me to have received the consideration to which it may ultimately be entitled; because it may well be, that although there may be no liability attaching upon those other directors, in respect of the letter of the 24th January, 1846, all or some of them may

* 417 be liable for some portion of the costs which * have been incurred. I refer particularly to the costs of the action which was brought under the order, in which one at least of these

other parties seems to have concurred, for he was the chairman of the meeting at which that action was directed to be brought. The case, however, is not in a state in which any declaration of liability can be made. In this state of circumstances, it seems to me that the only safe course is to reserve the question of liability, retaining the present call on the parties who are clearly liable, and reserving also the question of the costs.

The following were the minutes of the order: "Dismiss the appeal without prejudice to any question between Lord Londesborough, Mr. Gore, and Mr. Beauclerk and the other directors on the one hand, and the other directors on the other; and also without prejudice to any question between Lord Londesborough, Mr. Gore, and Mr. Beauclerk and the other directors on the one hand, and such of the allottees as may have signed the deed not on the faith of the letter of guarantee on the other hand; with liberty to all parties to take any proceeding before the Master or otherwise as they may be advised. Reserve all costs both here and before the Vice-Chancellor and the Master."

Under the liberty reserved by this order evidence was adduced before the Master on behalf of Lord Londesborough, to show that five other directors had rendered themselves liable to contribute to the payment of the amount for which the call had been made. The Master, however, found that no one of these five directors was liable so to contribute.

1854. February 25.

* Lord Londesborough appealed against this decision, * 418 and the appeal now came on to be heard before the Lords Justices. The material circumstances relating to the cases of these five directors were the following.

The first case was that of a Mr. Brent, who was appointed a director, or one of the members of the committee of management of the company on the 1st of November, 1845, and was also a shareholder. The grounds on which it was contended that he was liable to contribute were, first, that he had attended at meetings held after the resolution of the 24th of January, 1846, had been passed, without taking any step for the purpose of disturbing that resolution. Secondly, that he was one of the plaintiffs in an action brought against the chairman of the South-Eastern Railway Company by some of the directors of the Dover, Deal, and Cinque Ports

Railway Company, upon an agreement, part of which was that the directors of the Dover, Deal, and Cinque Ports Railway Company should undertake with their shareholders that they should be responsible for the return of the whole amount of the deposits. Thirdly, that in a suit in Chancery, instituted by the chairman of the South-Eastern Railway Company against Mr. Brent and other of the directors of the Dover, Deal, and Cinque Ports Railway Company, Mr. Brent and other directors of the latter company put in their answer, stating, among other things, that they and the committee of management entirely acquiesced in and accepted the terms stated in the letter of the 23d of January, as the plaintiff well knew; and that, under the circumstances aforesaid, and relying on the promise and assurance as aforesaid of the plaintiff, the said committee of management of the Dover, Deal, and Cinque

Ports Railway Company, including the defendants, proceeded to allot the shares in the company, and each letter of allotment was accompanied by a printed copy of the letter of the 23d of January, as finally approved and settled by the plaintiff. Evidence was, however, adduced before the Master to show that this statement in the answer was inserted by mistake, and was not according to the facts of the case. Fourthly, that Mr. Brent attended meetings held on the 26th of March, 1846, and the 1st of April, 1846, when resolutions were passed, having reference to an application to the South-Eastern Railway Company for a copy of the minute of the order by which that company had agreed to the terms of the arrangement with the Dover, Deal, and Cinque Ports Railway Company.

The second case was that of a Mr. De Burgh, who had attended a meeting held on the 27th of January, at which, however, it did not appear that any thing passed on the subject of the contract or arrangement between the South-Eastern Railway Company and the Dover, Deal, and Cinque Ports Railway Company. Mr. De Burgh was not a shareholder.

Another case was that of Colonel Dickson, who had attended a meeting on the 19th of November, and was party to some of the negotiations with the South-Eastern Railway Company, but not to the conclusion of the arrangement between the companies. He was not a shareholder.

Another case was that of a Mr. Thompson, who became a director on the 29th of February, and was an active party in the

commencement of the action against Mr. MacGregor. He was also a shareholder.

The remaining case was that of a Mr. Mackeson, the * cir- * 420
cumstances of which were substantially the same as those
of Mr. De Burgh.

Mr. Bacon, Mr. Hislop Clarke, and Mr. Honeyman, for the appellant.

Mr. Selwyn, for the official manager.

Mr. Follett, Mr. Goodeve, Mr. Cairns, and Mr. Mackeson, for the other respondents.

THE LORD JUSTICE KNIGHT BRUCE. — I doubt very much whether the order directing this company or intended company to be wound up ought to have been made, and whether, being made, it ought to stand. That, however, is not the question now before the Court. We must act upon it as a subsisting and valid order.¹ A call has been made by the Master upon three gentlemen, and three only. As I understand, each of the three was not merely a director, but was a shareholder also. One of these gentlemen, Lord Londesborough, complains of the call only to this extent, — that five other gentlemen (respondents on this occasion), or some one or more of those five, ought to have been associated with himself and Mr. Gore and Mr. Beauclerk in the call, for the purpose of being jointly liable with him. That is the point for decision before us, and that alone. The question is not whether, if Lord Londesborough shall pay this call, he will be entitled to sue the other five gentlemen, the respondents, or any one or more of them, for contribution. The question is, whether these gentlemen are contributories to the company or alleged company ordered to be wound up.

Now as to three of the five respondents it is, I apprehend, * quite impossible so to decide, for not one of the * 421
three ever took or accepted or had a share in any sense of the expression. It is true that they were in such positions that (to use a common phrase) they might have had shares for the asking for them. But the application was not made; not one of them was

¹ *In re London Marine Insurance Case*, L. R. 8 Eq. 176, 189.

legally or equitably invested with any share. They may or may not be on the Master's list of contributories. In my opinion, if they are there, they ought not to be there, and it has been decided that if, upon application to the Court in respect to a call, it shall appear in a satisfactory manner, that any of those on whom the call purports to be made, though on the list of contributories, ought not to be on that list, the call ought not to be enforced against such persons. In my opinion, it is manifest that Colonel Dickson, Mr. De Burgh, and Mr. Mackeson are in that situation. The present application must therefore, in my judgment, be refused as against these three gentlemen. The question, then, is confined to Mr. Brent and Mr. Joseph Thompson. Now the three gentlemen, of whom one makes this motion, entered into a certain engagement to return the deposits of all those who might become shareholders without deduction. That intention — that promise — that agreement — must be taken to have been communicated to all who afterwards became shareholders. Did that promise, did that undertaking, bind at the time when it was made any but the three persons promising? I apprehend most clearly not. It was beyond the powers of the directors so to bind others, and no one was affected by the undertaking except the three; no one is affected by it but the three, except so far as any other persons or any other person may, by subsequent ratification or adoption, have become associated in the promise for the purpose of equal liability. The burden of proof in that respect is wholly upon those who make the allegation, because, in the absence of proof, it is

* 422 clear that the * liability only falls upon the three. The question is, whether Lord Londesborough does prove that allegation.

Mr. Brent and Mr. Joseph Thompson stand each in two positions, one that of shareholder and the other that of director. Considered merely as shareholders, they are entitled to the benefit of the promise made by the three. It is in the capacity of directors that they are to be, if at all, associated in a liability to the performance of the promise. Each of them denies that he adopted the promise or became or intended to become liable to it. Notwithstanding that denial, it is asserted that their acts amounted to an association of themselves in the promise (whether it be called ratification, sanction, adoption, or by any other term); but, as it seems to me, all the acts that have been done are equally

consistent with either supposition. It is at least as natural and reasonable to suppose that they acted as directors, meaning that the contract with the South-Eastern Railway Company should be executed, but that they should not come under a liability to indemnify the shareholders, if that intended combination between the two companies should not take effect, as that there was a different intention. There seems hardly to have been an act which is not equally referable to either intention; and if I am to consider probabilities, the probability is, that neither of them would without necessity undertake an onerous liability under which he was not, and which he might avoid. It would require clear evidence to prove that a man did intend to place himself, and did consequently place himself, in such a position. Now I can see no such plain or clear evidence of intention. I can see nothing, as I said, but a series of acts consistent either with the existence or the absence of such an intention.

Reliance has been placed upon the declaration in the * action, and upon the answers in the suit in Chancery: * 423 and for the present purpose I will assume the declaration to be in evidence as an admission, or to be capable of being used as an admission, without, however, giving any opinion upon that point. But the declaration was a declaration in an action in which only Mr. MacGregor, as I understand it, on his own behalf or on behalf of the South-Eastern Railway Company, was a defendant, and the answers were in a cause in which Mr. MacGregor in the same character was, as I understand the facts, the only plaintiff. They are, therefore, as *Mr. Cairns* very properly observed, not in the nature of estoppels; they are not here to be considered as within those rules of pleading which apply to proceedings between the parties to the particular litigation. They are used for another purpose, and are merely admissions in the technical sense of that phrase when we are speaking of the law of evidence; and as to those probably the rule cannot be better expressed than it was by Mr. Justice BAYLEY, in the case of *Heane v. Rogers*, (a) where he says, "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or were

(a) 9 B. & C. 577-586.

untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition. In such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction ; but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind parties and privies, not strangers." I am of opinion that this case is not brought within any of the exceptions that Mr. Justice BAYLEY mentions; that

accordingly it is competent to each of the persons whose
* 424 * answers have been read against them to show that the answers were through mistake or otherwise inaccurate; and we have to consider the matter here as merely in a civil point of view, and not for any purpose directly or indirectly criminal. Now the evidence, besides the declaration and the answers, clearly satisfies me that the facts must be considered as they would have been independently of the declaration, and independently of the answers. That being so, I can see no sufficient ground upon which Lord Londesborough, on whom the burden of proof lies, can say to Mr. Brent or to Mr. Thompson, that either of them did as a director come under that liability under which there was no obligation upon either to come ; and since, as shareholders, they are entitled to the benefit of the promise, and as directors they have not come under an obligation to perform it, I am of opinion that the Master is wholly right.

The Lord Justice TURNER, after stating the facts of the case, said : Three points are urged as to Mr. Brent, for the purpose of fixing him with a liability to a portion of this call. In the first place, it is said that he had been appointed a director of this company, or one of the members of the committee of management of the company, on the 1st of November, 1845 ; that he attended at the subsequent meetings after the resolution of the 24th of January, 1846, had been passed ; and that he took no steps for the purpose of disturbing that resolution. In the second place, it was said that he was one of the plaintiffs in the action brought against the chairman of the South-Eastern Railway Company, upon the footing of the arrangement with the Dover, Deal, and Cinque Ports Railway Company, part of which arrangement was that the directors of the Dover, Deal, and Cinque Ports Railway Company should undertake with their shareholders that they would

* be responsible for the return of the whole amount of the * 425 deposits. And, thirdly, it was said that Mr. Brent had admitted in the answer put in by him to the bill filed by the chairman of the South-Eastern Railway Company his full acquiescence and agreement in the arrangement. It is also said that there were some resolutions of the 26th of March and the 1st of April, 1846, which had reference to an application to the South-Eastern Railway Company for a copy of the minute of the order by which they had agreed to the terms of the arrangement with the Dover, Deal, and Cinque Ports Railway Company. All these facts are said to show such a case of concurrence on the part of Mr. Brent in the arrangement with the South-Eastern Railway Company, and in the undertaking that the directors of the Dover, Deal, and Cinque Ports Railway Company should become liable to their shareholders for the return of the deposit, as to fix a liability upon him.

We must examine separately these several grounds. With reference to the first, Mr. Brent not having attempted to disturb the resolution of the 24th of January, the earliest attendance which took place at the board of the Dover, Deal, and Cinque Ports Railway Company on the part of Mr. Brent, after the passing of that resolution, was on the 26th of February, 1846; and it is in evidence before us, that the allotment of the shares in this company was completed as early as the 2d of February, 1846, and that the letters were sent out with the issue of the shares. How, then, could any thing have been done on the part of Mr. Brent which would have had the effect of undoing what had already been done by Lord Londesborough and the other two members of the committee of management as early as the 24th of January, 1846? It seems to me therefore that neither Mr. Brent's attendance on the 26th of February, nor his attendance * at the * 426 subsequent meetings, can be sufficient to render him liable.

Then as to Mr. Brent having been a plaintiff in the action which was brought against the chairman of the South-Eastern Railway Company. That was an action brought by the directors of the Dover, Deal, and Cinque Ports Railway Company, of whom Mr. Brent was one at the time when the arrangement with the South-Eastern Railway Company was made. And Mr. Brent having been a director at that time, he was bound to bring the action for the benefit of the company, upon having an indemnity for the use of his name. Moreover, the object of the action was to recover

damages against the South-Eastern Railway Company ; and it does not follow, from his concurrence in an action to recover damages against that company, that he had agreed to indemnify the shareholders of his own company. That obligation depends not upon the contract between the South-Eastern Railway Company and the Dover, Deal, and Cinque Ports Railway Company, but upon the issuing of the letters by the committee of management of the Dover, Deal, and Cinque Ports Railway Company.

With regard to the answer of Mr. Brent and his co-defendants in the Chancery suit, they say [his Lordship read the passage from the answer, the substance of which is stated, *ante*, page 418].

This is an admission of the defendants' concurrence in the terms of the arrangement. But the arrangement was an undertaking, on the part of certain of the directors, that all the directors should guarantee all the shareholders, and that arrangement had actually been carried into effect by the issue of the letters before the time when Mr. Brent is shown to have been in any way privy to it. It does not seem to me therefore that any thing contained

in the answer can affect Mr. Brent. With respect to the resolutions of March and April, 1846, those resolutions * were merely entered into for the purpose of calling on the directors of the South-Eastern Railway Company to produce certain resolutions of the latter company, for the purposes of the action. It appears to me that the case as against Mr. Brent fails.

The case of Mr. De Burgh stands on grounds somewhat different, and, in one respect, somewhat more favourable to Lord Londesborough, for Mr. De Burgh attended the meeting of the 27th of January, and, at that period, the allotment had not been completed ; whereas the allotment had been actually completed before Mr. Brent was brought into connection with the company. But the question is, whether the circumstance of the allotment not having been completed before the 27th of January is to make Mr. De Burgh liable with Lord Londesborough in respect of the undertaking contained in the resolution of the 24th of January. Now it is not proved that Mr. De Burgh took any part whatever in the allotment of the shares, and I do not see how any liability is to be fixed upon him as between him and Lord Londesborough, on the mere ground that he did not interfere upon the 27th for the purpose of stopping that act being done, which Lord Londesborough had directed to be done on the 24th. With reference to the action, and

with reference to the answer, the case, as to Mr. De Burgh, stands precisely on the same footing, according to the view I take of it, as the case against Mr. Brent.

The case of Colonel Dickson is certainly the weakest of the whole, for the last meeting which he attended took place on the 19th of November, whereas this arrangement with the South-Eastern Railway Company was not made until the month of January, and the letters under which the liability arose to the shareholders in the * company, were not issued until the * 428 24th of that month. The only circumstance which could affect the liability of Colonel Dickson is, that of his having been a party to the negotiations between the South-Eastern Railway Company and the Dover, Deal, and Cinque Ports Railway Company. But Colonel Dickson was not a party to the conclusion of these negotiations, nor is there any thing to show that he ever concurred in the conclusion of the arrangement which was completed or carried out at the meeting of the 24th of January.

As to Mr. Thompson, the observations which I have made on the other cases apply. He did not come in until the 29th of February. It is true he was an active party in the commencement of the action against Mr. M'Gregor, and seems to have directed that action to be brought ; but (as I observed in Mr. Brent's case) that action was brought for the benefit of the company, and does not, in my mind, import or create any liability on the part of Mr. Thompson to the shareholders in the Dover, Deal, and Cinque Ports Railway Company.

As to Mr. Mackeson, I think his case stands exactly on the same footing as the case of Mr. De Burgh ; and, looking therefore at the cases of these several parties, it does not appear to me that Lord Londesborough has established his case against any one of them.

The principles on which the decision in the case of *The Charitable Corporation v. Sutton* (a) proceeded, do not seem to me to be wholly inapplicable to the present case. In that case there was a committee of management. Of that committee some of the members acted far beyond their authority : others stood by and did not * interfere. Lord HARDWICKE said that those who * 429 had done the acts were first liable ; the others in the second

(a) 2 Atk. 400.

degree. Here the acts done were done under the resolution of Lord Londesborough, and the two others who concurred with him passed on the 24th of January; and, if the other directors could be made liable to the shareholders, from their not having interfered to disturb those acts, they would, according to the principle of *The Charitable Corporation v. Sutton*, be liable only in the second degree to the shareholders of the company. If, as between them and the shareholders, they would be liable only in the second degree, I am at a loss to see on what ground the party liable in the first degree can establish a charge against them.

THE LORD JUSTICE KNIGHT BRUCE. — Lord Londesborough will not have to pay any increase of costs, occasioned by the Master's rejection of the answers as evidence; but, with that exception, we think that he must pay the costs.¹

1853. June 11. Before the LORDS JUSTICES.

By a lease empowering the lessee to build, he covenanted to cultivate the part of the demised land, on which no buildings should be erected, in a husband-like manner, and there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor, but, being obliged to discontinue the manufacture by an indictment, he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor, in pursuance of an agreement between them: *Held*, that the lessor had not in equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down, and an injunction to restrain an action of ejectment was dissolved.

Quære, whether a statement framed thus, "it being at variance with the intention, &c.," is a sufficient allegation of a fact in a bill.

THIS was an appeal from an order of Vice-Chancellor STUART granting, on motion, an injunction to restrain execution on a judgment at law, upon an ejectment for breach of covenants in a lease.

The lease was dated the 21st of February, 1844, and was made between James Messenger the elder, and Mary Ann his wife, and

¹ See 2 Lindley Partn. (Eng. ed, 1860) 1144.

² S. C., 22 L. J. Ch. 964.

James Messenger, George Bance and Mary Ann his wife, of the first part; Henry Rowland and James Smith of the second part; and Arthur Hills of the third part. It contained a covenant by Arthur Hills (the lessee) in the following words: "And the said Arthur Hills, for himself, his heirs, executors, administrators, and assigns, do hereby also covenant, promise, and agree that he or they shall or will use, cultivate, and manage such part of the said pieces or parcels of land, upon which no buildings shall be erected, in a good and husband-like manner and condition, and shall not sell from off the said land any soil, earth, or gravel therefrom, except that he, the said Arthur Hills, his executors, administrators, and assigns, shall and may, if he or they shall think proper, dig up and convert the soil of the said piece of ground, now used as a brick field, into bricks, and to burn the same thereon for the purpose of using the same in any buildings or erections upon the said demised premises, but not otherwise, paying unto the said lessors for the * time being at and after the rate of 2s. * 431 per 1000 for such bricks so made thereon by him, the said Arthur Hills, his executors, administrators, and assigns, and shall and will, from time to time, and at all times during the said term, at his and their own costs and charges, keep in good repair all buildings which may hereafter be erected thereon, and every part thereof, and shall and will, if he shall erect a dwelling-house thereon, paint in good oil colours all such parts of the outside thereof as are usually or ought to be painted once in every four years, and the inside parts thereof once every seven years of the said term."

Soon after the execution of the lease the lessee erected upon the demised land a vitriol manufactory, and also a naphtha manufactory, and nearly covered the whole of the land with the buildings constituting such manufactories, the vacant ground being used in connection therewith; and such erections were built and completed with the knowledge and consent of the lessors, who were, before the lease was granted, well aware of the purposes to which the land was to be applied.

Some time in the year 1851 an indictment was preferred against the lessee in respect of the vitriol and naphtha manufactories, and the other buildings in connection therewith, being a nuisance. By reason of this proceeding, and of the buildings not being adapted to any other purpose, it was arranged between the lessors and the

lessee that the buildings should be taken down, and the materials sold, and part of the proceeds paid to the lessors. This arrangement was carried into effect, and two sums of 150*l.* and 12*l.* were paid to the lessors out of the proceeds of sale of the materials.

Afterwards the lessee deposited the lease by way of
 • 432 • equitable mortgage with the London and Westminster Bank, and in February, 1852, he was declared bankrupt.

By a decree dated the 26th of June, 1852, in a foreclosure suit instituted by the mortgagees, the leasehold premises were ordered to be sold in default of payment of the principal, interest, and costs, due in respect of the mortgage.

All rent which became due in respect of the premises previously to the bankruptcy was paid by the lessee, and he duly performed the covenants in the lease until he became bankrupt.

On the 1st of January, 1853, the lessors commenced an action of ejectment in the Court of Exchequer to recover possession of the land, by reason of alleged breaches of the covenants contained in the lease, for payment of rent, and for cultivation and management of the land. The action was tried at the Surrey Assizes, held in Hilary Term, 1853, and a verdict was given for the plaintiffs on both of the breaches. An application was made to enter a nonsuit, but was refused, and the plaintiffs in the action obtained judgment against the lessee.

The lessee and his mortgagees then filed the present bill against the lessors, stating that the proceedings at law were contrary to equity, "it being at variance with the intention of the parties to the lease, and the agreement come to for the granting of such lease, that the tenant should remain subject to such covenant after buildings had been erected;" and that such lease, so far as it

bound the lessee to cultivate and manage the land in a good
 • 433 and husband-like manner, after the land, by • reason of buildings being erected thereon, ceased to be agricultural land, was incorrectly framed, and ought to be re-formed and corrected; and that such lease was, in fact, prepared by the solicitor of the lessors, and was never submitted to or approved of by any solicitor acting for the lessee.

The bill further stated that the assignees of the lessee had never elected to take to the lease, and that the lessors abstained from taking, and had not taken, any step to compel such election, and by reason thereof the lessee, and the London and Westmin-

ster Bank, had been left by the assignees and lessors in uncertainty as to their rights, obligations, and position, and had been unable to act in relation to the said land and premises, and that had the assignees elected not to take to the lease, the plaintiffs would have been willing to pay the rent, and to have performed all the covenants in the lease; and that in case the assignees had elected to take to the lease, the London and Westminster Bank would, in fact, have seen to the payment and performance of such rent and covenants; so that in either case there would not have been any breach of covenant.

The prayer was for an injunction to restrain the lessors from taking possession of the hereditaments comprised in the lease, and from all further proceedings in the action, and that the lease might be rectified and re-formed so as to limit the covenant to cultivate and manage in a good and husband-like manner until the erection of buildings on the land.

The Vice-Chancellor granted the injunction, the plaintiff in equity undertaking to pay rent, and made adequate compensation to the defendants, such compensation to * be deter- * 434 mined by arbitration, if the defendants so required.

Mr. Bacon and Mr. W. W. Cooper, for the appellants.

Mr. Malins, Mr. Ogle, and Mr. Charles Hall, for the respondents.—The conduct of the landlords amounted to a dispensation with the covenant. They knew of the erection of the manufactory, and accepted rent after it had become impracticable to restore the land to cultivation; and they actually received part of the proceeds of the building materials when the works were pulled down. After standing by and seeing the lessees lay out their money in the buildings, and participating in the proceeds, they cannot in equity enforce the legal right if such right exists. It was, however, a surprise upon the plaintiffs in equity to find that such a right could be held to exist even at law.

THE LORD JUSTICE KNIGHT BRUCE.—A Court of Law has decided adversely between these parties, that the covenant in the lease in question “for using, cultivating, and managing such part of the land upon which no buildings shall be erected,” extends, according to its true construction, to land that after having been

built upon had been cleared of the buildings ; and the same Court has also decided between the same parties that after the buildings which stood upon this land had been cleared away the land was not used, cultivated, and managed in a good and husband-like manner and condition ; namely, that from February or March, 1852, when the buildings were removed, until the following August, or the end of the following December (it is immaterial which), the

land had been treated in a manner at variance with the
 * 435 covenant, and in opposition to it. * If we were at liberty to enter into the question of the propriety of the decision at law (which I do not apprehend that, in the circumstances of the case, we are), I do not see any reason in point of law, or in point of fact, for dissenting from the adjudication.

That being so, I am at a loss to see what equity there is in the case. If the breaches material to be considered, or any breach material to be considered, had been before the taking-down of the buildings, then much of the argument we have heard would have been more material than I have been able to consider it to be ; but confining our attention, as we have done, and as in effect the jury and the Court of Law also did, to the breaches after the buildings were taken down, I do not see any equity. There was no lying by, no encouragement, no license, no acquiescence, either in a legal or (if there be a different sense here) in an equitable sense of the expression.

There is a suggestion upon the bill — if the word suggestion is not too strong a term — that there was an intention to make the lease correspond with an agreement for a lease which preceded the lease. I doubt much whether that case is upon the bill in point of pleading ; but assuming the case to be upon the pleadings, yet the evidence makes out no such thing. It should be shown for the purpose of establishing that proposition that the parties had intended that the lease should execute the agreement, and should do neither more nor less, and that by mistake it had failed in its purpose, and that the present plaintiff had come with reasonable despatch to complain of it. Now the lease was in 1844, — this bill was filed in 1853. [After commenting on the evidence, his Lordship said :]

* 436 * The case, therefore, seems to me to fail. It is said that it will be improved at the hearing : it may be so, but there does not seem to me, at present, sufficient probability of

that to make it right to maintain the injunction. I think that the injunction should be refused, without prejudice to any question.

THE LORD JUSTICE TURNER. — This bill is founded on two alleged equities, — one to have the lease re-formed; the other, that the position of the tenant has been so altered, with the concurrence of the landlords, as to entitle the tenant to relief against forfeiture. With regard to re-forming the lease, it is to be observed that there was a written agreement, followed by a regular lease, differing in many particulars from the agreement. The *prima facie* conclusion from these facts is, that there was a new agreement with which the lease is in conformity. This is attempted to be met by evidence of what was the intention of the lessee's solicitor. But we must also consider what was the intention of the landlords. Suppose the lessee's solicitor had said, "I mean the covenant only to be applicable so long as no buildings have been erected." Would the landlords have agreed to that? There is nothing to show that they would. If the solicitor, in settling the terms of the lease, fell into the error of inserting a covenant going beyond the intention of the parties, the plaintiff's remedy is against him, and not against the landlords.

With regard to the alteration in the tenant's position, the only conduct on the part of the landlords which is capable of being relied on, seems to be their concurrence in the arrangement as to pulling down the buildings, and I do not see how this can affect the question as to the cultivation of the land after the buildings were pulled down. I think that both grounds fail, and that the injunction must be dissolved.

* WEBSTER v. WEBSTER.¹

* 437

1853. July 16. Before the LORDS JUSTICES.

A separation deed in which the husband covenants with a surety that he will not visit the wife without the surety's consent, does not contemplate reconciliation and subsequent separation, so as to be void as being contrary to public policy.

Where a husband in a separation deed covenanted with a surety (who covenanted

¹ S. C., 22 L. J. Ch. 837; 17 Jur. 315.

to indemnify the husband against the wife's debts) to pay the wife an annuity for life: *Held*, that a subsequent agreement between the husband and surety, that if the wife returned to live with the husband the annuity should continue, was valid and enforceable in equity.¹

THIS was an appeal from the decision of Vice-Chancellor STUART, overruling a demurrer of an executor to a creditor's bill seeking the administration of a testator's estate. The case is reported below in Messrs. Smale and Giffard's Reports, Vol. I. page 491, where the material allegations in the bill are fully set out. The following summary of them may be here found convenient.

By a deed of separation dated the 4th of September, 1844, made between the testator, his wife, and a surety, the husband covenanted with the surety that the wife might at all times during her life live apart from her husband, and that the husband would not, without the consent of the surety, visit her, or come into any house in which she should reside. The husband also covenanted with the surety to pay the wife for her life an annuity of 65*l.* per annum. And the surety covenanted to indemnify the husband against the wife's debts. The separation accordingly took place, and continued till 1845, when the husband, being in a bad state of health, requested her to return to him, stating that if she did so the annuity should continue payable. She declined doing so unless with the consent of the surety; whereupon the husband went to the surety and stated that if the wife returned to him the annuity should not only be continued, but should be secured on his real estate. On this assurance the wife returned to her husband, and lived with him till his death. The present bill was filed by the widow against the husband's executor and executrix, and the surety, for the administration of the husband's estate.

* 438 * *Mr. Malins* and *Mr. Macqueen*, for the appellants, contended that the deed was not of that kind which had been held valid, the covenant that the husband would not visit the wife without the surety's consent obviously implying that with such consent he might visit her, and consequently contemplating reconciliation and subsequent separation. Such a contract is contrary

¹ See *Randle v. Gould*, 8 El. & Bl. 457; 4 Jur. N. S. 304; 27 L. J., Q. B. 57; 6 W. R. 108; *Byrne v. Lord Carew*, 13 Ir. Eq. Rep. 1; *Bateman v. Ross*, 1 Dow, 245; *Bindley v. Mulloney*, L. R. 7 Eq. 343.

to public policy. *Westmeath v. Westmeath*, (a) which overrules *Rodney v. Chambers*; (b) *Wilson v. Mushett*. (c) The agreement that the annuity should continue after reconciliation was voluntary and ineffectual.

Mr. Lee and *Mr. C. Hall*, in support of the bill, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — If there is an arguable point on this deed, there is only one. The deed contains this covenant: [His Lordship read the part of the covenant agreeing that the wife might live apart from her husband.] Now if the covenant had ended there, no question could have been raised, for the deed would have been one the legal validity of which is established by repeated decisions. The question, therefore, is, whether the covenant not to visit the wife without the surety's consent alters the case. The argument is, that although the husband might well covenant not to visit his wife at all, he cannot covenant not to visit her without the trustee's consent. To that argument I cannot accede. It is said that the wife had an annuity which was liable to cease on her returning to live with her husband, and that after he had persuaded her to return on a promise that the annuity should continue, his representatives may nevertheless insist that the annuity ceased. * Such a proposition is * 439 merely irrational. The appeal must be dismissed.

THE LORD JUSTICE TURNER. — Two questions have been raised: first, whether the deed is illegal; secondly, whether — if it is not — the annuity ceased on the wife's return to live with her husband. As to the first question, the case of *Westmeath v. Westmeath* (a) differs materially from the present, as the deed there contemplated subsequent reconciliations and separations from time to time. It is said that the covenant not to visit without consent in effect amounts to the same thing. But I think that we ought not, without necessity, to put a construction upon this covenant which would make it destroy the validity of the rest of the deed, and I do not think there is any such necessity.

Upon the second question, it seems to me impossible to main-

(a) Jac. 140; 1 Dow, & Cl. 519.

(c) 3 B. & Ad. 743.

(b) 2 East, 283.

tain that when the husband says to the surety, in a separation deed, that if the wife will return an annuity shall continue to be paid, that is not a perfectly good contract available in equity. I think the demurrer was very properly overruled. As the whole case is open, we can direct the demurrer to be overruled with costs, although the Vice-Chancellor has not done so.

Demurrer overruled, with costs below and on appeal.

1853. July 19. Before the LORDS JUSTICES.

A money lender agreed to advance a sum at 8 per cent per annum, and the premiums on the insurance of the borrower's life. The borrower executed a bond with sureties, conditioned for payment of an annuity during his life equal to the above aggregate sums, and any increase in premiums by reason of the grantor being abroad; and the condition also provided for the cesser of the annuity on notice and payment of the original sum advanced, and all arrears of the annuity up to that time, but said nothing as to the policy: *Held* that, on redemption, the borrower had no equity to have the policy delivered to him.²

THIS was an appeal from a decree of Vice-Chancellor STUART, directing a grantee of an annuity which had been redeemed to deliver up a policy of assurance effected by him on a grantor's life.

The treaty for the grant of the annuity commenced in November, 1821, when the plaintiff, having occasion for the sum of 200*l.*, answered an advertisement inserted by one Mr. Burt in a provincial newspaper, and desired to know on what terms Mr. Burt would make the required advance.

Mr. Burt replied by letter, dated the 23d of November, 1821, as follows: "The terms of loan are eight per cent, besides insurance of the life; one or two guarantees also of undeniable responsibility

¹ S. C., 22 L. J. Ch. 912; 17 Jur. 704.

² See *Courtenay v. Wright*, 2 Giff. 337; 6 Jur. N. S. 1283; *Ex parte Lancaster*, 4 De G. & S. 524; *Knox v. Turner*, L. R. 9 Eq. 155; S. C., L. R. 5 Ch. Ap. 515; *Lea v. Hinton*, 5 De G., M. & G. 823; *Drysdale v. Piggott*, 22 Beav. 238; 8 De G., M. & G. 546.

and character will be required ; I should like a reply at your earliest convenience, as in the hope of your negotiation being final I have discontinued the advertisement."

The terms were acceded to, and some delay having taken place in completing the transaction, the plaintiff wrote to Mr. Burt, who, it appeared, acted in the transaction as the agent of a Mr. John Pollard Davey, and in answer received from Mr. Burt the following letter, dated the 3d January, 1822: "My dear Sir,—When your messenger called at my office yesterday, I was too much engaged to reply to your favour, and without reference to Mr. Davey I hardly know what answer to give, as every thing now seems to depend on him. The settlement of the business would be, I think, much facilitated by your seeing Mr. Davey, either at his house or abroad, * when you can fix the day next week, let * 441 it be either Thursday or Friday, when you and he and the guarantees can attend, informing me of the same; previous to which attendance Mr. Davey should wait on Messrs. Eastlakes, and desire them to order the policy, and have it dated on the same day, whether Thursday or Friday, as the business is settled, because until the money is advanced no interest in your life arises on the part of his son, who is the lender of the money, and who must be the insurer of your life."

In pursuance of this letter the plaintiff had an interview with Mr. Davey, the father of John Pollard Davey, and a policy of insurance on the plaintiff's life was ordered, and the 10th of January was appointed to complete the transaction.

The amount of premium required for insuring the plaintiff's life in the European Office in the sum of 200*l.* was 5*l.* 9*s.* 2*d.*, which it was stipulated and agreed that the plaintiff should pay in addition to the interest on the sum of 200*l.* at the rate of eight per cent per annum.

On the 10th of January, 1822, the transaction was completed, Mr. Burt, as the agent of John Pollard Davey, advancing to the plaintiff the 200*l.*, and the plaintiff and three sureties, William Hayne Grylls, John Crouch Grylls, and Edward Jorey, executing a bond, dated the 10th of January, 1822, whereby the plaintiff and William Hayne Grylls, John Crouch Grylls, and Edward Jorey became jointly and severally bound to John Pollard Davey in the penal sum of 400*l.*, with a condition for making the same void on payment by the plaintiff and William Hayne Grylls, John Crouch

Grylls, and Edward Jorey, their heirs, executors, or administrators, or some or one of them, to John Pollard Davey, his executors, * administrators, or assigns, during the plaintiff's life, an annuity of 21*l.* 9*s.* 2*d.*, by quarterly portions, on the several days therein mentioned, during the continuance of the annuity, or in the space of twenty-one days at farthest after each of the said days, without any deduction or abatement whatsoever, with a proportionate part of such annuity in case the plaintiff should die on any other day than one of the quarterly days of payment, from the time which the plaintiff had lived of the then current quarter of a year, and on payment in like manner to John Pollard Davey, his executors, administrators, or assigns, of all additional premiums of insurance occasioned to or paid by him or them in consequence of the plaintiff being ordered abroad on foreign service, or otherwise absenting himself from this kingdom ; or — in case at or after the expiration of two years from the date of the bond the plaintiff and William Hayne Grylls, John Crouch Grylls, and Edward Jorey, or either of them, their or either of their heirs, executors, or administrators, should be desirous of redeeming the annuity or yearly sum of 21*l.* 9*s.* 2*d.*, and of such their or either of their intention should give six calendar months' notice in writing under their or either of their hands unto John Pollard Davey, his executors, administrators, or assigns — that then and in that case on payment unto John Pollard Davey, his executors, administrators, or assigns, at the expiration of such notice as aforesaid, or of any other similar notice which might be afterwards given, of the sum of 200*l.*, being the original purchase-money of the annuity, and all arrears of the same, together with the costs, damages, charges, additional premium, or additional premiums of insurance, and all other expenses whatsoever, at any time or times incurred or sustained by John Pollard Davey, his executors, administrators, or assigns, with relation to the annuity up to and inclusive of the day of redeeming the same.

* 443 * Simultaneously with the bond the plaintiff and the same sureties executed a warrant of attorney of the same date to enter up judgment for 400*l.*, with costs of suit, subject to a defeasance in similar terms to those of the condition of the bond.

On the same day an insurance was effected on the life of the plaintiff in the European Life Insurance Company for the amount of the loan, dated the same 10th of January, 1822, and thereby, in

consideration of the yearly sum of 5*l.* 9*s.* 2*d.*, to be paid to the company, the funds and property of the company were made subject and liable to pay and satisfy within six calendar months after the due proof should be received of the death of the plaintiff, unto John Pollard Davey, his executors, administrators, or assigns, the sum of 200*l.*, and such further sum or sums as should, under the regulations of the company, be appropriated as a bonus to the policy.

By an indenture dated the 22d of September, 1849, in consideration of 185*l.*, the annuity, and all arrears thereof, and also the bond, warrant of attorney, and policy of insurance, were assigned to the defendant Elizabeth Cranch, her executors, administrators, and assigns, for her and their own absolute use.

On the 22d of April, 1852, the plaintiff, in pursuance of a notice given according to the terms of the bond, paid to Elizabeth Cranch the sum of 200*l.* for the repurchase of the annuity, and at the same time paid up all the arrears, and thereupon demanded the delivery of the bond, warrant of attorney, and policy of assurance. The solicitor of Mrs. Cranch delivered up to the solicitor of the plaintiff the bond and warrant of attorney, but refused to deliver up the policy.

* The plaintiff then filed the present bill, charging that * 444 Elizabeth Cranch was in equity a mere trustee of the policy for the plaintiff; and praying that it might be declared that the plaintiff was entitled in equity to the policy, and to the money to arise therefrom; and that the defendant Elizabeth Cranch might be decreed to assign and deliver the said policy of assurance to the plaintiff free from all incumbrances created thereon by the defendant; and that the defendant might be ordered to pay the costs of the suit.

Mr. Chandless and *Mr. Speed*, for the plaintiff. — By the very terms of the original arrangement the transaction was a loan of 200*l.* at eight per cent. The grantor paid the premiums on the policy, and became entitled to it when the loan was paid off. The stipulation as to paying additional premiums of itself was sufficient to show the true nature of the contract.

They referred to *Phillips v. Eastwood*; (a) *Ex parte Andrews*; (b)

(a) *Ll. & G., temp. Sug.* 289.

(b) *2 Rose*, 401.

Holland v. Smith ; (a) *Humphrey v. Arabin* ; (b) *Williams v. Atkyns* ; (c) *Godsall v. Boldero*. (d)

Mr. Giffard, for the defendant, was not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — The mere circumstance that a purchaser of an annuity insures the life on which the annuity depends, does of course not give to the person or estate that pays the annuity an interest in the policy. In that
 • 445 simple state * of things the policy belongs merely to the person who has chosen to effect it for his own protection or advantage. It generally, or often, happens that when an annuity is purchased, the amount of the annuity, or the price to be given, is fixed on the principle of obtaining for the purchaser a certain amount per cent for his purchase-money, and enough also to insure on the ordinary terms the life on which the annuity depends. If there is no more in the case, the rights of the purchaser remain exactly as they would have done if the price or amount had been calculated without reference to any such considerations. So also it is not an uncommon thing, when the price or amount of the annuity has been fixed with reference to such considerations, to provide that if the person on whose life the annuity depends shall go to India, or, in case of a man, shall enter into the military service, by which the expense of insurance is increased, the amount of the difference shall be paid by way of addition to the annuity, because that changes the calculation, or (I should rather say) adds a new element to those upon which the calculation generally proceeds. And if there is nothing more in the matter than that common ingredient in the transaction, this also does not vary the case, because in each of those states of circumstances it is at the option of the purchaser of the annuity whether he will insure or not, whether he will make a contract with an insurance office, or become his own insurer. Nor does it make a difference though there shall be a covenant that the person on whose life the annuity depends shall, on a reasonable request, attend at an insurance office, in order that the medical officer there may examine the life,

(a) 6 Esp. 11.

(b) Ll. & G., *temp.* Plunket, 318.

(c) 2 Jo. & Lat. 603; see also *Ex parte Varnish*, 1 Mont., D. & De G. 514.

(d) 9 East, 72; 2 Smith's Leading Cases, p. 157; but see *Dalby v. India Assurance Company*, 18 Jur. 1024.

and see whether the insurance is one fit to be taken. That also is common. There may be particular circumstances of contract, or there may be representations, express or to be inferred, that may change the nature of the case. I have looked * in vain * 446 for any such circumstance here. I find nothing but a plain declaration of the principle on which the calculation proceeded, and which is more or less involved in every one of these annuity transactions, whether mentioned or not; but the purchaser of the annuity still remained at liberty either to drop or keep up the policy. The grantor could not complain, whether he did or did not keep it up. The purchaser might have been his own insurer, at his own choice, for his own benefit, and at his own risk.

Therefore I do not see any ingredient in the present case upon which it can be brought within the authorities cited. The plaintiff's counsel has made the most of his materials, but has not been able to convince me that there is any thing in his cause but substantially the ordinary and simple transaction that I have mentioned, in which the policy belongs to the purchaser of the annuity, as I think this does.

THE LORD JUSTICE TURNER. — As a general rule it is not disputed, that where the grantee of an annuity insures the life of the grantor, the policy effected belongs to the grantee. The question here is, whether there are any special circumstances to take this case out of the general rule. Was there any contract between these parties that the policy, on the redemption of the annuity, should belong to the grantor? for the case, no doubt, might be affected by such a contract. I see no evidence of any such contract. The first letter which passed between the parties refers indeed to its being necessary to provide for the insurance of the grantor's life, but it is evident that that letter was meant only to state the terms on which the money would be lent. It amounts to no more than a statement of the calculation which the grantee had made as the foundation * of the terms on which he would advance * 447 his money. The same observation applies to the second letter. So far as the letters are concerned there is a total absence of contract between the parties as to the property in the policy. Then comes the stipulation in the bond, that if the grantor shall go abroad the extraordinary premiums occasioned thereby shall be paid by the grantor. That provision, however, imposes no obliga-

tion on the grantee to keep the policy on foot. It means this, that he may keep up the insurance, taking the amount payable at the office as the measure of the risk he runs. There being then no contract between the parties, nor, so far as I can see, no other special circumstances affecting the question, how does the case stand upon principle? The money which the grantee receives becomes the grantee's own money. He receives eight per cent on his loan, and, besides that, an annual sum, which he applies in keeping on foot the policy. The money so applied is not the grantor's money, but the grantee's; and what equity is there for the grantor to have the benefit of the application of the money of the grantee? I think that there is no foundation whatever for this bill. It must be dismissed with costs, but there will be no costs of the appeal.

1854. July 26. August 2, 5. Before the Lord Chancellor Lord CRANWORTH.

A Court of Equity will not interfere at the instance of a remainder-man, in cases of permissive waste, either by injunction or to give satisfaction against an equitable tenant for life in possession. Testator by his will directed his trustees, after payment of the expenses of keeping his estates in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and, after payment thereof, to pay the rents to A. and B. successively for life, with remainder to trustees to preserve, with remainder to the first and other sons of B. successively in remainder, and the several heirs male of the bodies of such sons. On a bill filed by the trustees, at the instance of one of the remainder-men in tail, against the second tenant for life, for the purpose of making him accountable for permissive waste: *Held*, that the costs of the trustees whose bill was dismissed, ought to be paid out of the corpus, and not out of the rents and profits of the estate.

THIS was an appeal by the defendants Anthony Blagrove and John Henry Blagrove from a decree of the Vice-Chancellor Wood, in a cause in which the trustees of certain real estates were the plaintiffs and John Blagrove, the tenant for life of the estates, and the appellants, the tenants in tail in remainder, were the defend-

¹ S. C., 18 Jur. 462.

ants. The questions raised by the appeal were, first, whether a tenant for life in possession was accountable in equity at the instance of a remainder-man for permissive waste; and, secondly, whether, upon the true construction of the will, certain costs of the trustees who raised the question were payable out of the rents and profits, or out of the corpus of the estates. The Vice-Chancellor decided that a Court of Equity had no means of interfering in cases of permissive waste by a tenant for life, and that the costs in question were payable out of the corpus of the estate. The following extract of the will of the testator, under which the question arose, together with the facts which are material to be stated, are taken from the report of the case in the first volume of Mr. Kay's Reports, page 495.

John Blagrove by his will bequeathed to his wife Anne Blagrove one undivided moiety of certain leasehold hereditaments absolutely, and also gave her for life * (subject to the pro- * 449 visos thereafter mentioned) his mansion, park, and appurtenances at Calcot, desiring her to dwell there; and, immediately after her ceasing to inhabit and dwell therein, the said house and park to go to his trustees thereafter named and their heirs, in the same manner as they would go in case his said wife was dead; and he gave and devised to John Blagrove and John Simeon, their heirs, executors, and administrators, all and every his freehold and leasehold messuages or tenements, lands, tithes, and hereditaments, at Reading, and also all other his real estate whatsoever and wheresoever in trust, to pay certain annuities and debts as therein mentioned; and from and after payment thereof, and "the expenses of keeping my said estate in repair, and all such costs as my said trustees shall expend or be put unto by means of the trusts hereby reposed in them on trust to pay out of the overplus rents and profits" certain sums for maintenance and jointure, and after payment thereof, then in trust to pay the rents of all his said freehold and leasehold estates unto the said John Blagrove during his life to his own use; and from and after his decease then to stand seised of the testator's real estate to the use of John Blagrove the younger, eldest son of the said John Blagrove, during his life, with remainder to trustees to preserve contingent remainders, with remainder to his sons successively in tail male, with remainder to Thomas Blagrove, second son of the testator's niece Frances Blagrove, for life, with remainder to trustees to pre

serve contingent remainders, with remainder to his sons successively in tail male, with remainder to Anthony Blgrave for life, with remainder to trustees to preserve contingent remainders, with remainder to his sons successively in tail male, with divers remainders over.

And the will contained the following provisos: "Provided * 450 always, and my will is, that from and after payment * of every thing charged on my real and personal estates, the said John Blgrave and the said John Simeon, their executors and administrators, shall stand possessed of my undivided moiety of the said leasehold messuages, lands, tithes, and estates in Reading aforesaid in trust; out of the rents and profits thereof, to keep such parts thereof as I let at rack rents in good repair; and from time to time to pay the overplus thereof to such and the same person and persons as shall from time to time be entitled to the rents and profits of my real estates: Provided always, and my will is, that it shall not be lawful for my said trustees, or any other person or persons who shall be in possession of my several estates under and by virtue of this my will, to cut any oak timber from off any part of my estates, not even for repairs; but that the person or persons who shall from time to time be in possession of my said estates, or entitled to the rents and profits thereof, shall purchase scantle oak timber for such repairs as oak will be wanting."

The testator died in 1787; his widow was also now dead. John Blgrave survived his co-trustee, and died in 1827, leaving his son, John Blgrave the younger, his heir-at-law, who thereupon entered into possession of the devised estates as tenant for life thereof. John Blgrave the younger had no issue. Thomas Blgrave was dead without issue, but Anthony Blgrave was living and had a son named John Henry Blgrave, who was the first tenant in tail under the will.

By decrees in two other suits, concerning these estates, which came on together on the 28th of April, 1847, Lord Justice KNIGHT BRUCE, then Vice-Chancellor, granted an injunction to restrain cutting timber and other waste by John Blgrave the * 451 younger on the estates, * and one of the questions in those suits being the duration of the trusteeship under the will, his Honor directed a case to be sent to the Court of Exchequer to inquire of what estate the said John Blgrave (who was the heir of the surviving trustee as well as tenant for life as aforesaid) was

seised in the freehold hereditaments under the will. The case will be found reported on these points in 1 De G. & S. 252, and 4 Exch. 550, where the will of the testator is stated at length, and from the latter report it appears that the question sent to the Exchequer was answered by a certificate that John Blagrove the younger was seised in fee-simple of the said hereditaments.

By an order made in the said suits, dated the 13th January, 1851, Henry Phillip Powys and Cecil Monro were appointed trustees of the testator's will jointly with John Blagrove the younger, and the said hereditaments were vested in the three for an estate in fee-simple in joint tenancy upon the trusts of the will. Henry Phillip Powys and Cecil Monro now filed the bill in this suit against John Blagrove the younger, Anthony Blagrove, and John Henry Blagrove, and others, as defendants, stating the above facts and stating as follows: " Since they were appointed such co-trustees as aforesaid, the plaintiffs have ascertained, and the fact is, that the said estates have been allowed to fall and are very much out of repair, and that the dilapidations thereon are daily increasing, and the defendants the said Anthony Blagrove and John Henry Blagrove, as the persons entitled in remainder to the estates, insist that under the trusts of the said will the plaintiffs and the said defendant John Blagrove (as such trustees as aforesaid) are bound to put and keep the estates in repair, and have called upon and required, and are still calling and requiring the plaintiffs accordingly, to put the * same estates, or cause * 452 the same to be put into, and to keep or cause the same to be kept in, a proper state of repair; and the plaintiffs have made, or caused to be made, repeated applications to the said defendant John Blagrove the younger (who is so as aforesaid in possession or receipt of the rents and profits thereof) to comply with such requisition; but he declines so to do, insisting that he is under no obligation to comply therewith, and that the plaintiffs have no right to interfere, inasmuch as he contends that the trusts contained in the said will to keep the said estates in repair ceased upon the death of the said John Blagrove the elder, and that he, the said defendant John Blagrove the younger, is under no liability whatever in reference to keeping the same estates in repair, except as tenant for life thereof; whereas the defendants Anthony Blagrove and John Henry Blagrove, as such remainder-men as aforesaid, insist that the said trust for repairs is a subsisting trust which

ought to be performed, and that in case of non-performance thereof the plaintiffs will be liable as for a breach of trust."

The bill prayed, among other things, that the trusts of the will might be carried into effect, and that it might be declared whether the said trusts for keeping the said estates in repair was or not a subsisting trust, and for a receiver of the rents, and an injunction to restrain the tenant for life from receiving the rents and profits of the said estates, or interfering or intermeddling therewith, or in the management thereof.

Mr. Rolt and *Mr. Cottrell*, for the appellants. — The whole scheme of the will is to keep the corpus of the estate unaffected by the charges and trusts created thereby; thus the annuity of the testator's widow and any mortgages which might be created were to be paid off out of the rents and profits. We submit that if there was not an express trust to repair imposed on the trustees, it is clear that so long as they had the legal estate (which the Court of Exchequer, in *Blagrove v. Blagrove*, (a) has decided that they have) and had duties to perform, so long were they bound to keep the property in substantial repair, just as the defendant John Blagrove, if he had had the legal estate, would have been impeachable of waste and bound to have kept the property in repair. It is laid down, by Lord COKE, that waste may be done in houses by pulling or prostrating them down or by suffering the same to be uncovered, (b) which is permissive waste; and, by the 24th chapter of the statutes of Marlbridge (52 Hen. 3) it is provided, that "fermors" (which term includes tenants for life) "shall not make waste of any thing belonging to the tenements that they have to ferm without special license, &c.), and the expression "to do or make waste," Lord COKE says, "in legal understanding, in this place includes as well permissive waste, which is waste by reason of omission or not doing, as for want of reparation, as waste by reason of commission, &c.;" "for he that suffereth a house to decay, which he ought to repair, doth the waste." (c) But, inasmuch as the defendant John Blagrove is only equitable tenant for life, and we are not in a condition to proceed at law against him, he ought, by analogy, to have the same obligation imposed on him in this Court, and to be im-

(a) 4 Exch. 550.

(b) Co. Litt. 53 A.

(c) 2 Inst. 145.

peachable of waste in equity. We do not, however, rest on the analogy of legal liability alone: the cases of *Parteriche v. Powlet* (a) and *Marquis of Ormonde v. Kynersley* (b) are direct authorities in our favour; in the former, Lord HARDWICKE said, "Notwithstanding tenant for life is without impeachment of waste, he shall be obliged to keep tenants' houses in repair unless the charge is excessive, and shall * not suffer them to run to ruin." * 454

[THE LORD CHANCELLOR. — It is impossible that Lord HARDWICKE could have so laid down the law; what meaning could, in such a case, be attributed to the words "without impeachment of waste" ?]

In the latter case of *Marquis of Ormonde v. Kynersley* (b) Sir THOMAS PLUMER said, "that the restraint upon the legal owner as to equitable waste was to be considered as founded on a breach of that trust and confidence which the deviser reposed in the tenant for life, that he would use his legal estate only for the purpose of fair enjoyment; that it was a trust implied in equity from the subsequent limitation and from the presumed intention of the testator that he meant an equal benefit to all in succession." In the case of *Re Skingley* (c) there was an express obligation imposed on the tenant for life; in the present case there is an implied obligation to the same extent. They also referred to *Greene v. Cole*, (d) *Shallcross v. Finden*, (e) and *Caldwall v. Baylis*. (g)

The decree, so far as it directs the costs of the trustees to be paid out of the corpus of the estate, is erroneous, the testator having himself expressly pointed to the rents and profits as the fund out of which they were to be provided.

Mr. Chandless and *Mr. Surrage*, for the plaintiffs, the trustees.

Mr. Pearson, for Anne Cullum, an annuitant under the will of the testator.

Mr. Craig and *Mr. Wickens*, for the defendant Colonel Blagrove, the second tenant for life. — The case made by the appellant

(a) 2 Atk. 383.

(b) 5 Mad. 369.

(c) 3 M. & G. 221.

(d) 2 Saund. 252.

(e) 3 Ves. 738.

(g) 2 Mer. 408.

* 455 is wholly unsupported * by any authority, except the single one of *Parteriche v. Powlet*; (a) but the dictum there attributed to Lord HARDWICKE has never been regarded as law, and its inaccuracy is expressly referred to and observed upon by Lord REDESDALE, in the case of *Clinan v. Cooke*. (b) The estate of a remainder-man is not under any obligation to repair dilapidations, which have occurred in the lifetime of his predecessor; in the present case, a period of seventy years has elapsed, during all which time this suit might have been brought, and the claim, therefore, must be regarded as a stale demand. The trust for repairs, in the will, was express only so far as concerns the leasehold property held at rack rent under the Crown, and inasmuch as there was an express trust to repair, with respect to a certain portion of the testator's property, therefore no trust to repair can be implied as to the residue of the property. "Expressio unius exclusio alterius." The duration of the trust also was confined only to the lifetime of the first tenant for life; and the mere fact of ordering the rents and profits to be applied for the purposes of repairs, has not the effect of confining the trustees to the funds derivable from annual rents. *Allan v. Backhouse*. (c)

They relied upon the following authorities: *Kingham v. Lee*, (d) *Turner v. Buck*, (e) *Lord Castlemain v. Lord Craven*, (g) *Marquis of Lansdowne v. Marchioness of Lansdowne*; (h) and referred to *Pomfret v. Ricroft*. (i)

Mr. Cottrell, in reply. — The case of *Duke of Leeds v. Earl of Amherst* (k) is * an authority to show that, in cases of waste, the remainder-man is not bound to bring his bill until his estate falls into possession, which effectually disposes of the imputation of laches attributed to the plaintiffs here.

August 5.

THE LORD CHANCELLOR. — The first question is, whether under

(a) 2 Atk. 383.

(c) 2 V. & B. 65.

(b) 1 Sch. & Lef. 22; see p. 35.

(d) 15 Sim. 396.

(e) 22 Vin. Abr. 523, tit. "Waste," pl. 9.

(g) 22 Vin. Abr. 523, tit. "Waste," pl. 11.

(h) 1 J. & W. 522.

(k) 2 Phil. 117.

(i) 1 Wm. Saund. 323, n.

this testator's will there is a trust to keep in repair, over-riding the equitable life-interest of the defendant John Blagrove.

It is not material to consider what the trust was prior to that life-estate, for all right against the assets of the trustees, during the life of John Blagrove the father, was waived in the former decree. Indeed, Mr. Cottrell expressly confined his claim to the period since 1827. There would be great difficulty in dealing with the question thus restricted, even supposing the trust to have continuance, for the defendant John Blagrove would be entitled to say his liability, or rather the liability of the trustees since 1827, ought not to be to keep the property in such repair as it was then in, but to keep it in good repair, having first put it into good repair at the expense of those who held it prior to 1827. It is not, however, necessary to consider this, for I think there was no trust to repair after the death of John Blagrove the father. I do not feel called on to go through the will in detail, as has been done very fully and ably by the Vice-Chancellor. I content myself with saying that I entirely adopt his reasoning. The will is very inartificially drawn, but the testator clearly meant that on the death of John Blagrove the father, the successive *cestuis que trust* should be let into possession, though the trustees still retained the legal estate, in order to enable them, if necessary, to raise the sums charged on the property. The dispositions seem to have been studiously made for the purpose of showing * that * 457 the testator did not intend to place John Blagrove the father, who was himself a trustee, on the same footing with those who should succeed him.

After providing for the payment of the annuities to his wife, his sister-in-law, and his niece Mrs. Cullum, and directing contingently that a sum of 10,000*l.* should be raised for the children after her death, he proceeds thus: [His Lordship here read from the will as to the trusts for payment of interest on the money to be borrowed, and the expenses of keeping the estates in repair, and the costs of the trustees, above set out, and proceeded:] And he then makes provision for the defendant John Blagrove by securing to him an annuity during his father's life, with a power to charge the estate with a jointure in favour of any woman he might marry, and who should bring him a fortune. In all these trusts he clearly contemplated that the trustees were themselves to receive and dispose of the rents, and then he proceeds thus: "and in trust

to pay and apply the surplus rents and profits of all my said freehold and leasehold estates in paying off and discharging the principal money so to be borrowed; and after payment thereof, then in trust to pay the rents and profits of all my said freehold and leasehold estates unto the said John Blagrove during his life to his own use:"

He then goes through a long series of limitations, giving life-estates to the sons of John Blagrove the father, successively, with the usual limitations to preserve contingent remainders and with remainder to their first and other sons successively in tail male. Now I think it impossible to read these limitations, without at once feeling satisfied that the testator considered that the right of possession in his trustees was to cease.

It is true that they might still have to exercise their
* 458 * right or duty of entering for the purpose of raising money by mortgage or otherwise. But in the mean time he considered that the persons beneficially entitled would be in possession. This is quite inconsistent with the notion of a trust to receive the rents and apply them in keeping the houses in repair.

This disposes of the first question. The order on this point was right. But then it was argued, independently of the trust, that it is the duty of a tenant for life to repair. "Equitas sequitur legem." But even legal liability now is very doubtful. *Gibson v. Wells*, (a) *Herne v. Benbow*. (b) Whatever be the legal liability, this Court has always declined to interfere against mere permissive waste: *Lord Castlemain v. Lord Craven*; (c) there the Master of the Rolls said, "the Court never interposes in case of permissive waste either to prohibit or to give satisfaction, as it does in case of wilful waste." ¹

On this ground, relief was refused in *Wood v. Gaynon*. (d) In that case, a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the

(a) 1 N. R. 291.

(b) 4 Taunt. 764.

(c) 22 Vin. Abr. 523, tit. "Waste," pl. 11.

(d) Amb. 395.

¹ See Lewin Trusts (5th Eng. ed.), 416; *Harnett v. Maitland*, 16 M. & W. 257; 1 Lead. Cas. in Eq. (3d Am. ed.) [608], 700 *et seq.*; 2 Dan. Ch. Pr. (4th Am. ed.) 1634.

plaintiff, saying that as there was no precedent he would not make one; adopting the argument that it would tend to harass tenants for life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwall v. Baylis*, (a) it does not sustain the doctrine for which it was cited. The case of *Re Skingley* (b) was founded on the express obligation of the lunatic to keep in repair. * I do not refer to the cases * 459 where the question has been as to the right to charge assets. There the decisions have rested on other grounds. There is no precedent for what is asked in this respect; I certainly will not be the first to make one.

The only other point calling for a decision is as to the costs. It is said that they are to be paid out of rents and profits. [His Lordship here referred to the passage in the will relied upon by the appellants (*ante*, page 449), and proceeded:] I do not say whether costs for raising the 10,000*l.*, if it should become raisable, would be to be borne by the corpus, or the life-interest. I am clear that these costs are not thrown on the life-interest. They are costs thrown on the trustees by the unfounded claim of tenants in remainder. The Vice-Chancellor, in my opinion, was quite right in throwing them on the corpus of that property, the due administration of which made the suit necessary. I think there is no foundation for the appeal, which must therefore be dismissed with costs.

* WARE v. LORD EGMONT.

* 460

1854. November 2, 4, 15. Before the Lord Chancellor Lord CRANWORTH.

The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.¹

(a) 2 Mer. 408.

(b) 3 M. & G. 221.

¹ See *Penny v. Watts*, 1 M'N. & G. 150 n. (2); 2 Lead. Cas. in Eq. (3d Am. ed.) [38], 138 and 152 *et seq.* in note to *Le Neve v. Le Neve*; *Attorney-General v. Stevens*, 6 De G., M & G. 111; *Finch v. Shaw*, 19 Beav. 500; S. C. *nom.* *Colyer v. Finch*, 5 H. L. Cas. 905; *Buttrick v. Holden*, 13 Met. 355; *Center*

The abstract of title of real estate disclosed the fact that the land-tax had been redeemed thirty-three years previously to the sale by persons acting as the guardians of an infant tenant in tail, out of the personal estate of the infant, who died a bachelor without having attained his majority; and, in a suit instituted shortly afterwards by the personal representatives of the infant against the then tenant in tail in remainder, a decree was made declaring them entitled to charge the estate with an amount equal to the consideration money paid for the redemption. A deed was prepared for the purpose of charging the estate accordingly, which was duly executed by the then tenant in tail in remainder, but he died without having suffered a recovery. The succeeding tenant in tail entered, suffered a recovery, and sold the estate to a purchaser for valuable consideration, who had no express notice of the facts above stated: *Held*, on a bill filed by the administrator *de bonis non* of the infant in tail against the purchaser, that the omission on his part to inquire whether the redemption of the land-tax might not have been so effected as to have given to third persons equitable rights, of which there was no trace on the face of the abstract, did not amount to gross negligence, and that he ought not therefore to be affected with constructive notice of such equitable rights.

THIS was an appeal by the defendants, the trustees and executors of Lord Arden, from a decree of the Vice-Chancellor STUART, who declared that the defendants, as representing the purchaser of certain real estate, were affected with constructive notice that the land-tax had been redeemed by means of funds belonging to an infant tenant in tail of the estate, who died in infancy, and that the circumstances of the case were such as to give to the representatives of the infant an equitable right to a rent-charge equal to the land-tax redeemed. So much of the facts as will suffice to render the report intelligible is extracted from the Lord Chancellor's judgment.

In 1782 Nathaniel Polhill was equitable owner in fee of the lands in question. He had contracted to purchase them, but they had not been conveyed to him. By his will dated the 14th of June, 1782, he devised all his real estate, which included his equitable interest in the lands in question, to his son Nathaniel for life, with remainder to his first and other sons in tail, with remainder to his son John for his life, with remainder to his first and other sons in tail, with several remainders over.

v. Blaire, 4 Cushman, 310; *Sargeant v. Ingersoll*, 7 Barr, 340; 3 Harris, 343; 1 Story Eq. Jur. §§ 399—400 d.; *Briggs v. Taylor*, 28 Vt. 180; *Jones v. Williams*, 24 Beav. 47; *Hull v. Noble*, 40 Maine, 459; *Warren v. Swett*, 31 N. H. 332; *Tillinghast v. Champlin*, 4 R. I. 173, 215; 2 Sugden V. & P. (7th Am. ed.) [1041], 539 *et seq.*; *Morland v. Cook*, L. R. 6 Eq. 252.

* Soon after the date of his will he died, and his son * 461 Nathaniel became tenant for life in possession. He, however, lived only a few weeks after his father's death. He died on the 30th of November, 1782, leaving an only son Nathaniel, then sixteen months old, who thus became equitable tenant in tail in possession. In July, 1783, the legal estate was duly conveyed to two gentlemen, Benjamin Way and Thomas Maitland (who had been named in the will of 1782, as trustees to preserve contingent remainders), and their heirs to the uses of the will, so that the infant thus acquired the legal estate as tenant in tail. These two gentlemen were apparently friends of the family; for, though they had no legal authority, they entered on the infant's lands and received the rents as his guardians. The rents thus accumulated in their hands amounted to a large sum, and in 1799, the year after the passing of the first Land-tax Redemption Act, they took on themselves to apply a portion of the money thus accumulated, in redeeming the land-tax on all the infant's property, which was situated in four several counties. The land-tax charged on the Surrey property now in question was 55*l.*, and the sum of 2016*l.*, 3 per cents, which was the consideration for the redemption, was purchased by means of the accumulated rents.

The infant tenant in tail died a bachelor in the spring of 1802, just two months before he would have attained his age of twenty-one years; and on his death John Polhill, the testator's second son, became entitled as tenant for life, and he entered and took possession accordingly. John Polhill had issue several children, of whom Thomas Polhill was his eldest and Frederic Polhill his second son.

After the death of Nathaniel Polhill the infant, Ursula * his mother, who had married James Ware, took out ad- * 462 ministration to her son, and in 1804 she and her husband filed a bill in this Court against John Polhill and Thomas Polhill, who was then an infant, and against the said Benjamin Way and Robert Maitland; and the bill prayed, amongst other things, that an account might be taken of the several sums of stock transferred from the personal estate of the said infant either in his life or after his death, in satisfaction of four contracts for the redemption of the land-tax on the devised premises, and of the dividends which would from time to time have accrued due on the said several sums of stock, if the same had not been transferred, and that the value

of the said several sums of stock and the amount of the dividends might be paid to the plaintiff; or that, as administratrix, she might be declared entitled to a perpetual rent-charge upon the said devised estate on which the said land-tax had been so redeemed, to the amount of such land-tax to be paid from the death of the infant.

The defendants duly answered the bill, and the cause was brought to a hearing before Sir W. GRANT, who referred it to the Master to inquire and state, among other things, the circumstances under which the contracts for redemption were made.

The Master's report under the decree made in July, 1804, stated several contracts by the trustees, as trustees and guardians for the infant in 1799 (under the Act 38 Geo. 3, c. 60, for making perpetual, subject to redemption and purchase of the land-tax), for the redemption of the land-tax charged upon the devised premises, and that there was not any option declared in any of such contracts. Some transfers of stock by the trustees in the names of the com-

missioners for the reduction of the national debt, in discharge of some of the instalments * which had become due * 463 under the contracts, were made before the death of the infant; other transfers were made in May and July, 1802, in discharge of the remaining instalments which became due after his death. All the payments were made out of the estate of the infant, not at the request of any person, but under the idea that, as the instalments became due, they were paid out of the infant's property and to be repaid by the parties who became entitled to the estates on the death of the infant.

The cause came on to be heard on further directions before Lord ELDON in July, 1805. Lord ELDON held that Messrs. Maitland and Way were not guardians within the Act, and had no authority to deal as they had dealt with the infant's property; but having so dealt, and as the estate had got the benefit of the transaction as it would if they had been the guardians and trustees and acted as such under the authority of the Act, there was an equity to have the estate as nearly as might be chargeable as it would have been charged in that case under the Act, and he so decreed. (a)

A deed was prepared for the purpose of charging the estates according to the decree, and it was executed by John Polhill in

(a) 11 Ves. 257.

1806, and by his eldest son Thomas in 1817, he having attained his majority in 1816. The personal representatives of the infant thus acquired a legal rent-charge valid against John and Thomas, but no recovery was suffered, and therefore the deed did not bind those entitled in remainder after the expiration of their estates.

John Polhill died in September, 1828, and in the following month of October his son Thomas died without issue, and without having suffered a recovery or done * any act to con- * 464 firm the rent-charge created by the deed which he had executed in 1817. On the death of Thomas, Frederic (his next brother) entered on the property, and he, in 1831, suffered a recovery and so acquired the fee-simple, subject only to the equitable right of the persons entitled under the decree. From the death of Thomas in 1828, Frederic continued regularly to pay to the personal representative of Nathaniel Polhill, the infant, the rent-charge as it had been paid by John and Thomas, from the date of the decree down to 1828. No deed was executed, nor was any legal charge created by Frederic. In 1835 Frederic Polhill sold the estate in question to Lord Arden for 19,000*l.* It appeared by the decision of Lord ELDON in the suit of *Ware v. Polhill*, (a) that the contracts for redemption had been entered into by persons who, though described as guardians and trustees for the infant, were in fact strangers, and it was in evidence that the abstract of title furnished to Lord Arden showed on the face of it that Nathaniel Polhill had died an infant and unmarried in April, 1802. It further appeared that upon the abstract of title delivered to Lord Arden's solicitors the property sold was described to be property the land-tax of which had been redeemed. It was admitted that neither Lord Arden nor his advisers had any actual notice of the plaintiff's claim, nor of the decree in *Ware v. Polhill*, (a) nor of the fact of any payment of the rent-charge having ever been made by Frederic Polhill.

The administratrix of the infant Nathaniel Polhill having died, letters of administration *de bonis non* of the infant were granted to M. Ware, the present plaintiff, who instituted this suit, insisting that the facts above stated ought to have put Lord Arden on inquiry, the result of which must have been to disclose the circumstances * connected with the redemption, which gave * 465 rise to the equity enforced by Lord ELDON's decree.

(a) 11 Ves. 257.

The Vice-Chancellor STUART, having been of opinion that the circumstances were such as to affect the purchaser with constructive notice of the plaintiff's claim, declared that the purchased property was liable to the payment of a yearly rent, equivalent to the amount of land-tax with which it was formerly chargeable. From that decree the defendants, the representatives of Lord Arden, now appealed to the Lord Chancellor.

Mr. Glasse, Mr. G. L. Russell, and Mr. Martin Ware, for the plaintiff, in support of the decision of the Vice-Chancellor. — We submit that the decree of Lord ELDON in *Ware v. Polhill* (a) bound the estate into whosoever hands that estate came; or, in the language of the Vice-Chancellor PARKER, in *Ware v. Polhill*, (b) “the annuities remained an equitable charge by force of the decree, the effect of which is to bind the inheritance for ever.”

In the present case there was enough to put the purchaser and his advisers on inquiry, as they had been furnished, at their own request, with a further abstract of title, showing that Nathaniel Polhill was an infant at the time when the redemption of the land-tax was effected. Much slighter circumstances were held sufficient to have imposed on a purchaser the obligation of inquiry. *Kennedy v. Green*. (c)

The Solicitor-General, Mr. Malins, and Mr. Rawlinson, *466 for the appellants, the representatives of Lord Arden. — *The form of the Vice-Chancellor's decree, treating Lord ELDON's decree in *Ware v. Polhill* as binding on the estate, is clearly erroneous, for Lord ELDON expressly makes the annuity only personal. *Ware v. Polhill*. (d) The annuity expired in 1828, on the death of T. Polhill, without having barred the estate tail; and the trustees having failed to call upon the succeeding tenant in tail to perfect the charge, there is clearly now no equity to enforce the charge as against a purchaser without notice, though there might be such an equity as against a volunteer. But assuming that the equity asserted in *Ware v. Polhill* (a) might be enforced, still the present plaintiff cannot insist upon any such equity as the plaintiffs in *Ware v. Polhill*, (a) inasmuch as he is only the administrator *de bonis non* of N. Polhill; but Ursula Ware, who was the

(a) 11 Ves. 257.

(c) 3 M. & K. 699.

(b) 5 De G. & Sm. 455.

(d) 11 Ves. 270; see p. 282.

administratrix of N. Polhill, survived her husband, and by the deed of 1806 the annuity was declared to be her separate property; her personal representative, therefore, is the only person entitled to sue. When, as in this case, there were four modes of proceeding for redeeming the land-tax on the lands of the infant under the Act 38 Geo. 3, c. 60, (a) any one of which might have been adopted by the persons who represented themselves as guardians of the infant, a purchaser was not bound to inquire further than to ascertain that the redemption had been effected in pursuance of one of such modes, and there can therefore be no such inference as that the money for the redemption of the land-tax was raised in a way which gives the equity asserted here. *Kenney v. Browne*. (b) The notice which is imputed to Lord Arden in this case is at the best but *constructive, *467 a doctrine which has found little favour in this Court, particularly when sought to be applied to a purchaser for valuable consideration and without notice. Unless it can be proved that the redemption was to the knowledge of the purchaser effected with the moneys of the infant, or that the purchaser was guilty of gross negligence, equivalent to *lata culpa*, it is impossible to impute constructive notice: *Jones v. Smith*, (c) in which case, on appeal, (d) Lord LYNDHURST expressed his disinclination to extend the doctrine. Assuming, however, as a fact which we deny, that Lord Arden had actual notice that the redemption was effected with the personal moneys of the infant, still we say that a Court of Equity will not impute to him a knowledge of the very refined rule of law established in *Ware v. Polhill*. (e) On this principle Lord HARDWICKE, in the case of *Warrick v. Warrick*, (g) held that a purchaser for valuable consideration was not to be affected with notice of the equitable rule under which a settlement made in pursuance of articles limiting a life-estate to the settlor, with remainder to the heirs of his body; will be rectified so as to give to the settlor a life-estate only, though as against the parties or mere volunteers such a rule would be enforced.

(a) See §§ 11, 20, 22, 37, 81, and Acts 39 Geo. 3, cc. 21, 40, 43, 108; 39 & 40 Geo. 3, c. 30; and Act 41 Geo. 3, c. 72, consolidated and amended by Act. 42 Geo. 3, c. 116.

(b) 3 Ridg. Parl. Cas. 462.

(e) 11 Ves. 257.

(c) 1 Hare, 55.

(g) 3 Atk. 291.

(d) 1 Phil. 244.

In short, a purchaser for value is not to be affected with constructive notice, unless, in the language of Lord ALVANLEY in *Hardy v. Reeves*, (a) “there is a clear, broad, plain equity.” In the same spirit Lord NORTHINGTON says, “a man must indeed take notice of a deed on which an equity, supported by precedents the justice of which every one acknowledges, arises, as in the case of prior incumbrances; but not the mere construction of words which are uncertain in themselves, and the meaning of which often depends on their locality.” *Cordwell v. Mackrill*. (b) The present claim might have been asserted in 1816, and it is clearly too late now. It is also to be observed that Lord Arden here gave the extreme value for this property, which is a circumstance always to be looked at in defence of a purchaser without notice. *Senhouse v. Earle*. (c)

They also referred to the cases of *Green v. Pulsford*, (d) *Parker v. Brooke*, (e) *Jones v. Powles*, (g) *Davison v. Daniels*, (h) *Attorney-General v. Backhouse*, (i) *Cothay v. Sydenham*, (k) *West v. Reid*, (l) *Hewitt v. Loosemore*. (m)

Mr. Glasse, in reply.

THE LORD CHANCELLOR. — The object of this suit is to make certain lands in the county of Surrey, to which the defendants derive title under the will of the late Lord Arden, liable to the payment of a yearly rent of 55*l.* per annum, being the amount of land-tax with which they were formerly chargeable. Lord Arden purchased these lands in 1835, and he purchased them as lands the land-tax on which had been redeemed; there is no doubt of the fact that the land-tax had been redeemed. It was redeemed very soon after the passing of the first Land-tax Redemption Act in 1798, the contract for redemption being dated in October, 1799. The consideration was 2016*l.*, 3 per cents, to be transferred by fourteen successive instalments, and the transfer of the last instalment was made in the summer of 1802. The land-

(a) 5 Ves. 426; see p. 431.

(b) 2 Eden, 344; see p. 347.

(c) Ambl. 285.

(d) 2 Beav. 70; Sug. Com. View, 613.

(e) 9 Ves. 583.

(g) 3 M. & K. 581.

(h) 16 Ves. 249.

(i) 17 Ves. 283.

(k) 2 B. C. C. 391.

(l) 2 Hare, 249.

(m) 9 Hare, 449.

tax was thus effectually redeemed, and the lands were therefore correctly described in the sale to Lord Arden as "land-tax redeemed." This is the common case of both parties. But then the plaintiff insists that the redemption was effected by means of funds belonging to an infant who died in infancy, and who is now represented by the plaintiff his administrator *de bonis non*, and that the circumstances of the case are such as to give to the plaintiff, against Lord Arden's devisees, an equitable right to a rent-charge equivalent to the land-tax redeemed. [His Lordship here stated the facts of the case as above set out, and having referred to the suit of *Ware v. Polhill*, and to the inquiries which had been directed on the original hearing as to the circumstances under which the redemption had taken place, said:] With reference to the inquiry as to whether any option had been declared on occasion of the redemption of any portion of the land-tax, and the Master finding thereon that there was no such option declared, it is necessary to observe that under certain provisions of the Land-tax Redemption Act, the person redeeming has the option either to redeem for the benefit of the estate, i.e. absolutely to extinguish the tax, or he may in certain circumstances declare an option to take the redeemed tax for his own benefit, so that the charge shall still subsist for the benefit of the person redeeming. In fact, no option was here declared, and so the legal effect of the redemption was to extinguish the tax.

The cause came on to be heard on the Master's report before Lord ELDON, and the view he took of the case was this: that Messrs. Way and Maitland, by whom the redemption was effected, were in fact mere strangers, though described as guardians and trustees of N. Polhill the infant; that they, no doubt, acted perfectly *bonâ fide*, and did what they thought most for the infant's benefit, and what probably would have been so if he had not died during his minority; but that, however honest their intentions, the effect of their act was to alter the nature of the infant's property, to convert in effect a portion of his personality into real estate; that that was what the Court does not permit; and Lord ELDON held that those claiming under the will behind the infant were bound to put his personal representatives as nearly as possible in the situation in which they would have been, if Benjamin Way and R. Maitland, when they applied the infant's personal estate in redeeming the land-tax, had declared

an option which would have given to them or to the infant an actual legal rent-charge equivalent to the amount of the land-tax. [His Lordship, after referring to the decree, and to the deed which was prepared in conformity therewith for the purpose of charging the estates, and after stating the deaths of John and Thomas Polhill without issue, and without having suffered a recovery, and the entry of Frederic Polhill in 1828, the recovery suffered by him, and the payment by him of the rent-charge, and the purchase from him, by Lord Arden, of the estate now sought to be affected, proceeded:] But as no deed was executed, nor any legal charge created by Frederic, the right of the persons entitled to the rent-charge was a mere equitable right. In this state of things, Frederic in 1835 sold the Surrey property for 19,000*l.* to Lord Arden. It was sold and conveyed as property the land-tax of which was redeemed; and it is admitted neither Lord Arden nor his advisers had any actual notice of the claim of the infant's personal representatives, that they had no actual notice either of the decree or of the fact of payment of the rent-charge. But the question is, whether,

though there was no actual notice, there was not what is * 471 called constructive notice,—notice of that which * ought to have led Lord Arden's advisers to make further inquiries, under which the whole truth would have come out, and the omitting to make which amounted to culpable negligence. For if such constructive notice is established, no doubt the defendants claiming under Lord Arden are bound by all the equities which affected Frederic Polhill the vendor, and he was certainly in no better position than that in which his brother Thomas had stood at the time of Lord ELDON's decree in 1805.

The circumstances relied on as establishing this constructive notice are, first, that the contract for redemption was entered into by Way and Maitland, who, though described as guardians and trustees for the infant, were in fact strangers; and, secondly, that the abstract stated the death of Nathaniel in April, 1802, an infant and unmarried, so that it was clear he could never have ratified any dealing with his personal estate whereby it was in effect converted into realty. It was argued, that these facts ought to have led the purchaser to make further inquiries; and that the result of such inquiries must have been to disclose the circumstances connected with the redemption which gave rise to the equity enforced by Lord ELDON's decree. But is this so? I en-

tirely concur with what fell from the Vice-Chancellor, that when an estate is sold as free from land-tax, the purchaser is bound to satisfy himself of the validity of the redemption, just as he is of any other point touching the title to the property. But the question is, whether there was not, in this case, sufficient reasonably to satisfy a purchaser that the title to the land-tax was perfect, or rather that all proper steps had been taken to extinguish the land-tax as a charge on the lands. That a good legal title was shown is not disputed; the adverse equitable title arose not from the redemption having been effected by persons acting with or without authority for an infant * who died under twenty- * 472 one, but from the circumstance that the consideration came out of his personal estate. Now I think that not only was there nothing to show that this was the case, but there was every thing to lead the purchaser to suppose the contrary. It may be observed, that Way and Maitland were described as guardians and trustees for the infant, and there was nothing on the abstract to show that they were not so. If, indeed, the title had depended on their being guardians, it would have been the duty of the purchaser to ask for evidence on the subject; but the point for inquiry was not what character they filled, but what fund they applied to the redemption. If it was a fund supplied out of the infant's personal estate, they were guilty of a misapplication of his property in not declaring an option, so as to keep the charge alive; if it was provided out of a fund properly applicable to the relief of the estate from the burden of the land-tax, then they were duly discharging their obligations to the infant. Why was the purchaser, finding that the land-tax had been effectually redeemed thirty-three years before his purchase and had never since been paid, to inquire whether those who redeemed might not have obtained the money from some fund not applicable to the purpose? I doubt whether, in any case, this is an obligation fairly attaching on a purchaser; but, in the present case, there was every thing to lead to the conclusion that the land-tax had been redeemed by means of funds properly applicable to the purpose; for, by the will of 1782, N. Polhill the testator gave his personal estate to these very gentlemen, B. Way and R. Maitland, in trust, to invest it in the purchase of lands to be settled to the same uses as the devised estates; and the 38th section of the Act 38 Geo. 3, c. 60, expressly provides that money so held on trust to be invested, may be applied in the redemption of the land-

tax. When, therefore, a purchaser found that the land-tax had in fact been redeemed thirty-three years before his purchase * 473 by trustees, * who might and very probably would have funds properly applicable for the purpose,—and further that no land-tax ever had been paid from that time,—I think it is impossible to charge him with culpable negligence, or even with want of caution, because he did not institute further inquiries as to the circumstances of the redemption. On this ground, therefore, that there was no gross negligence, nor, indeed (as I think), any negligence at all on the part of the purchaser, I feel it impossible to concur in the view of the case taken by the Vice-Chancellor; and entertaining, as I do, a clear opinion on this point, I do not feel it necessary to go into the other points of objection urged in the argument.

I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice; namely, that it is highly inexpedient for Courts of Equity to extend the doctrine, — to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him, — that he would have acquired it but for his gross negligence in the conduct of the business in question.

The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of * 474 gross or culpable negligence. It is obvious * that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down. But I think it clear that the imputation of gross negligence cannot fairly be fixed on a purchaser, merely because it did not occur to him or his advisers to inquire whether a transaction, legally valid and under which there had been long enjoyment (here it was for

thirty-three years), might not have been so conducted in its origin as to have given to third persons equitable rights, of which there was no trace on the face of the abstract.

The plaintiff having, in my opinion, failed in establishing any title to relief, his bill must be dismissed with costs.

JOHNSON v. WEBSTER.¹

1854. November 8, 9, 25. Before the Lord Chancellor Lord CRANWORTH.

Prima facie, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, and which he does not except.

When the owner of an estate has also a charge upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say, that without some special act, no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate, but where the intermediate estate is created by the act of the owner himself, this reasoning has no application.²

A., the devisee in fee of real estates, subject to a trust to raise 6000*l.* for B., which the testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate and to go to A., on his marriage conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6000*l.*, and died, leaving B. On B.'s death without children, the representatives of A. filed a bill to establish the charge: *Held*, under the circumstances, that it had merged in the inheritance.³

THIS was an appeal by the defendant Sir Godfrey Webster, the grandson of the testator Sir Godfrey Webster, from a decree of the Vice-Chancellor STUART. The facts of the case are reported in the second volume of Messrs. Smale and Giffard's Reports, page 136, and are here restated from that report.

* Sir Godfrey Webster, Baronet (No. 1), by his will * 475 bearing date the 15th November, 1779, directed his debts, legacies, and funeral expenses to be paid and satisfied; and in case

¹ S. C., 1 Jur. N. S. 145; 24 L. J. Ch. 300.

² See *Jameson v. Stein*, 21 Beav. 5; *Swiffen v. Swiffen*, 29 Beav. 199; *Pitt v. Pitt*, 22 Beav. 294.

³ See 1 Jarman Wills (3d Eng. ed.), 657.

his personal estate should not be sufficient for that purpose, he thereby charged his real estate, devised to his eldest son Godfrey Webster, with the payment thereof. The testator gave to his wife an annual rent-charge in lieu of dower, and then made the following gift: —

“I give and devise unto Charles Nairn, of Milkhouse, Kent, and John Campbell, of Lincoln’s Inn, Esquires, and to the survivor of them, their executors and administrators, the sum of 6000*l.*, in trust that they or the survivor of them, or the executor or administrator of such survivor, shall pay or cause to be paid the said sum of 6000*l.* unto my daughter Elizabeth Webster, on the day of her marriage, and until that event I direct the said sum to carry interest at 5 per cent; and I direct my son Godfrey Webster to pay such interest quarterly; and in case such interest shall be unpaid forty days after any quarterly day of payment, it shall be lawful for my said daughter Elizabeth to take and receive the rents and profits for her own use and benefit, until the said Elizabeth shall be paid and satisfied all arrears of interest, and all costs and charges and damages sustained by reason of the non-payment thereof; and I declare that I give the said sum of 6000*l.* to my said daughter, over and above all sums of money or other provision to which she may be entitled under my marriage settlement, or by any other means whatsoever; but I hereby declare that in case my daughter shall die without leaving any issue living at the time of her death, the said sum of 6000*l.* shall sink into the residue of my personal estate, and shall go to my son Godfrey Webster.”

* 476 * The testator, having given other legacies, devised his real estate to his eldest son Godfrey Webster, his heirs and assigns for ever, charged and chargeable nevertheless with payment of all or so much of his debts, legacies, portions, and funeral expenses as his personal estate should not be sufficient to satisfy and discharge. The residue of his personal estate not thereinbefore disposed of, he bequeathed to his son Godfrey Webster.

By a codicil to his will, dated the 17th of March, 1780, reciting the above gifts, he declared his will to be that the jointure, portions, legacies, debts, and funeral expenses should be charged on his manors of Robertbridge, Battle, &c. &c. within the rape of

Hastings, in the county of Sussex, and that his eldest son Godfrey Webster should hold his other estates free and discharged from such charges.

The testator died shortly afterwards, without revoking his said will, which was duly proved. His personal estate was insufficient, after payment of prior charges, to satisfy any part of the sum of 6000*l*.

From the death of the testator Sir Godfrey Webster (No. 1), interest, at 5 per cent, was paid to his daughter Elizabeth, out of the rents and profits of the real estate, until her death in 1833.

The 6000*l*. was never in fact raised by the trustees.

By indenture of lease and release, dated 22d and 23d of June, 1786, executed upon the marriage of the testator's eldest son Sir Godfrey Webster (No. 2) with Elizabeth Vassall, reciting that the said sum of 6000*l*. given to the said Charles Nairn and John Campbell was * then unpaid; and reciting that on * 477 the death of the said testator the then Sir Godfrey Webster (No. 2) was seised of the said hereditament, subject (*inter alia*) to the payment of the legacy of 6000*l*.; and reciting that Sir Godfrey Webster (No. 2), being so seised, was desirous that no part of certain sums charged by the will of Sir Godfrey Webster (No. 1) should be raised thereout for his benefit, but that, on the contrary, the same should sink into the said real estate; and reciting that a marriage was agreed on between the said Sir Godfrey Webster (No. 2) and the said Elizabeth Vassall, and that upon the treaty for the said marriage it was agreed that the said Sir Godfrey Webster (No. 2) should convey and assure his hereditaments in the county of Sussex, whereto he was entitled under the will of the testator, subject (*inter alia*) to the payment of the said 6000*l*.: it was witnessed, that, in consideration of the said intended marriage, all those manors, &c. were granted and released to the said Rose Fuller and Robert Cooper Lee, to the several uses thereafter declared concerning the same, freed and absolutely acquitted, exonerated, and for ever discharged of and from all claims and demands whatsoever of the said Sir Godfrey Webster (No. 2) into or out of the same premises under the will of the said testator in respect of the two several sums of 10,000*l*. and 1400*l*. under the indenture of 1775 directed to be raised by the said Charles Nairn for the benefit of the settlor, but subject as to such parts of the said

manors and hereditaments as by the will of the said testator were charged with payment of the portions and legacies given by the said will to the said Charles Nairn and John Campbell of the said sum of 6000*l.*, and of the said 1000*l.*, part of the said legacy or sum of 2000*l.*, by the said will of the said Sir Godfrey Webster

(No. 1) the testator respectively given to the said Charles * 478 Nairn and John * Campbell, their executors, administrators, and assigns, upon the trusts therein mentioned concerning the said sums of 6000*l.* and 2000*l.* respectively, together with all interest then due and to grow due for and in respect of the said several sums of 6000*l.* and 1000*l.*

The marriage was solemnized on the 26th of June, 1786. Sir Godfrey Webster (No. 2) died in 1800, having by his will bequeathed the whole of his personal estate to his mother, Dame Elizabeth Webster.

The estates descended to his eldest son Sir Godfrey Webster (No. 3).

Prior to 1800, Elizabeth Webster (the legatee of the 6000*l.*) married Mr. Thomas Chaplin.

By her will dated the 14th of May, 1802, Dame Elizabeth Webster bequeathed the whole of her personal estate to her daughter, Elizabeth Chaplin.

By her will dated the 29th of August, 1816, Mrs. Chaplin (her husband being then dead) bequeathed her personal estates to certain persons through whom the present plaintiffs claimed. She died on the 28th of October, 1833. Early in 1853, the plaintiffs filed this bill, praying for a declaration that the said sum of 6000*l.* was a valid and subsisting charge on the real estate; that the plaintiffs were entitled to interest for at least six years; for an account; that the said sum of 6000*l.* might be raised by a sale or mortgage of a competent part of the estate, &c., &c.

The Vice-Chancellor held that the charge was now sub- * 479 sisting, and directed the principal interest and costs * to be raised by a sale or mortgage of the real estate of Sir Godfrey Webster (No. 3), who now appealed.

Mr. Bacon and *Mr. Schomberg*, for the plaintiffs, in support of the decision of the Vice-Chancellor. — This Court will not presume a merger, unless it is assured, either that such presumption will be for the benefit of the owner of the inheritance, or unless there is

the clearest evidence of intention that the charge should not be kept alive. The 6000*l.* became raisable on the day of the daughter's marriage, and the mere accident of its not having been raised cannot alter the rights of the parties, equity considering that as done which is agreed to be done.

In the present case, so far as any evidence of intention can be adduced, it is against the merger; for not only was the existence of the charge expressly recognized in the deed of 1786, but it was obviously for the benefit of Sir G. Webster (No. 2), who was only tenant for life at the time, that it should be held to have been subsisting. They relied upon the following authorities: *Wyndham v. Earl of Egremont*, (a) *Forbes v. Moffatt*, (b) *Grice v. Shaw*, (c) *Davis v. Barrett*; (d) and they distinguished the present case from that of *Tyler v. Lake*, (e) where merger had been presumed, because there there was an express recital in a mortgage-deed that the estate was free from incumbrances.

Mr. Malins and *Mr. R. Pryor*, for the appellant Sir G. Webster. — We submit first that there was no charge under the * will of the testator Sir G. Webster (No. 1) in favour of * 480 his son; but even assuming that there was, it would have merged when he became under the same will, by the death of the testator in 1780, the owner of the fee, and as he manifested no intention of keeping the charge alive after it was competent for him to have done so.

The rule with respect to the raising of legacies payable at twenty-one, and charged on land, is firmly established, that such legacies will sink into the land for the benefit of the inheritance if the legatee should die under the prescribed age: *Poulet v. Poulet*, (g) *Fearne*, Cont. Rem., page 555, ed. 9, Butler's note; and, as a general rule, it is also clear that where a party has an estate in fee or in tail, and, at the same time, a charge upon the estate, the charge will merge. *Donisthorpe v. Porter*. (h)

We further submit that the settlement of 1786, being a conveyance to a purchaser for value, was of itself equivalent to an extinction of the charge. The expression in the will, that the legacy

(a) Ambl. 753.

(b) 18 Ves. 384.

(c) 10 Hare, 76.

(d) 14 Beav. 542.

(e) 4 Sim. 351.

(g) 1 Vern. 204, 321.

(h) 2 Eden, 162.

of 6000*l.* was to go back to Sir Godfrey (No. 2), was a mere inaccuracy of expression, inasmuch as the testator never intended that the 6000*l.* should be unconditionally raised.

The distinction between the present and the case of *Wyndham v. Earl of Egremont* (a) is, that there Percy Earl of Thomond was only tenant for life, and the presumption, therefore, of law was, that the charge was kept alive; so in the cases of *Forbes v. Moffatt* (b) and *Grice v. Shaw*, (c) there appeared in each irresistible evidences of intention of keeping the charge alive. It

* 481 * was said, that it was for the interest of Sir Godfrey (No. 2)

that the charge should be kept alive; but the answer to that is, that the merger took place between 1780 and 1786, and having once occurred, nothing short of a declared intention would suffice to rebut the legal presumption. It was further said, that the merger was not to be presumed because the charge of 6000*l.* was expressly recognized in the deed of 1786 as existing, while the other charges were there noticed as having merged; but it was only referred to because it was contingently raisable. It is clear that the settlor, after the execution of that settlement, could not have filed a bill to raise the 6000*l.*

It was argued that the 6000*l.*, though not actually raised, ought to have been raised; but the mere fact that it was not raised is sufficient to create different rights. On this principle it is that where a power of sale may be exercised by a mortgagee, the fact of its being exercised or not will determine the rights as to the surplus between the heir or personal representative of the mortgagor. *Wright v. Rose*. (d) They also referred to the observations of Lord ST. LEONARDS in *Walpole v. M'Clintock*. (e)

Mr. W. H. Harrison appeared for the Dowager Lady Webster.

Mr. Spencer Vincent, for the trustees.

Mr. Bacon, in reply.

November 25.

THE LORD CHANCELLOR. — The plaintiffs in this case are the personal representatives of Sir Godfrey Webster, who died in 1800.

(a) Ambl. 753.

(c) 10 Hare, 76.

(e) 7 Ir. Eq. 353.

(b) 18 Ves. 384.

(d) 2 S. & S. 323.

The defendants may be described generally as the persons *entitled to his real estate. The object of the bill is to have * 482 a sum of 6000*l.* raised out of the real estate for the benefit of those entitled to the personal estate. The question arises, first, on the will of Sir G. Webster, the father of the Sir Godfrey whom I have already named ; the father being called in the bill Sir Godfrey (No. 1), and the son Sir Godfrey (No. 2) ; and, secondly, on the settlement executed by Sir G. Webster (No. 2) on his marriage, bearing date the 22d and 23d of June, 1786. [His Lordship here referred to the will and codicil of Sir Godfrey (No. 1), and proceeded :] He died soon after the date of the codicil. Sir G. Webster (No. 2) duly proved his will. [His Lordship here referred to the marriage settlement of Sir Godfrey (No. 2), bearing date June, 1786, and continued :] The defendants are entitled to the real estates under the limitation to first and other sons of that marriage. Elizabeth Webster the legatee married Mr. Chaplin prior to 1800, and, having survived her husband, died on the 28th of October, 1833, without issue. The interest on the 6000*l.* was regularly paid to Mr. Chaplin by the owners of the estate from the time of her marriage to her death ; but the principal sum was never raised.

The present bill was filed 3d October, 1853. And the question is whether the plaintiffs have any title to the relief sought. They rely first on the terms of the will, whereby this 6000*l.*, in the event which happened, is expressly declared to form part of the testator's personal estate. Sir G. Webster (No. 2) took both the real and personal estate absolutely. But here it is said that the testator has expressly impressed on the contingent interest in this legacy the character of personal estate, and that the legatee never did any thing to alter its character. I do not, however, agree to this construction. The direction in the testator's will, that if his daughter Elizabeth * should leave no issue at her death * 483 the legacy should sink into the residue of the personal estate, meant simply that it should not be raised. He contemplated a personal estate sufficient, or probably sufficient, to pay his debts and legacies, and then any contingent interest of the person entitled to the residue, in a legacy which should eventually not be raisable, would be not inaccurately described as sinking into his personal estate.

The expression " sink into the residue " points to a charge which

had been previously provided out of the fund into which it was to sink, otherwise the expression "sink into the residue" would hardly be appropriate. I read the passage as if it had been merely a direction that, in the event of the legatee leaving no issue at her death, the legacy was to be restored to the funds from which it had been taken; and then the will had contained a general charge of debts and legacies on the real estate in case the personal estate should prove insufficient. The mere circumstance that the collocation of the sentences is different cannot be material; and if the charge on the real estate had been at the end of the will, it would have made the case more clear, but could not have affected the principle. On this first point, therefore, on which nearly the whole of the plaintiffs' case rests, I confess I differ from the Vice-Chancellor.

This is in truth a mere question of construction. What is the meaning of the will? I do not discover any intention to alter the character of the property, which would be a very strange intention to impute. But it was contended, that, without any such intention, the nature of the gift necessarily induces a change of quality in the property. Mrs. Chaplin, it was said, might, the day after her marriage, have insisted on a sale or mortgage of a competent part of the real estate, so as to place the
* 484 * 6000*l.* in the hands of the trustees. She might have filed a bill and have obtained a decree for that purpose. That may be; and if that had been done, if a suit had been instituted and a decree made, then there might have been *pro tanto* a conversion into personalty. But this depends, not on the language of the will, but on the acts done under it. If Sir G. Webster (No. 2) had actually sold a portion of the estate and invested the proceeds to the extent of 6000*l.* on securities in the names of the trustees, then, when by the death of his sister without issue his title to the 6000*l.* reverted to him, it would be his personal and not his real representatives who could claim it. It would in such case have been made actual personalty, and his representatives could only make title to it with the quality actually attaching to it. So if, without any actual sale or mortgage, there had been a suit and a decree directing a sale, this Court would have considered the sale as actually made, and the rights of the parties would have been regulated accordingly. Upon this principle the case of *Flanagan v. Flanagan* was decided by Lord CAMDEN in 1768. The

facts of that case are thus stated by Sir THOMAS SEWELL in his judgment in *Fletcher v. Ashburner*: (a) “ Sarah Woolly, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate as far as it would extend, and, in the next place, by sale of her real estate or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and after payment thereof in trust to convey the residue of the real estate which should remain unsold, and pay the produce of such part as should be sold and all other the residue of her real estates between her father James Flanagan and her brother James Flanagan, their * heirs, executors, and administrators, * 485 equally. A bill was brought by the creditors for sale of real estate to supply the deficiency of the personal estate for payment of debts, and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan the father and James Flanagan the son equally, and if any estate should remain unsold the trustees were directed to convey it to them and their heirs equally. After the decree James Flanagan the son died, leaving a daughter, and a son born after his death. Part of the estate was sold, and afterwards James Flanagan the grandfather died, leaving his grandson his heir, and his grandson and granddaughter his sole next of kin. After the death of the grandfather a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies. It appeared, however, that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan the son, claiming a moiety of the surplus as the real estate of James Flanagan the grandfather, to whom he was become heir, against the personal representative of his grandfather and against the daughter of James Flanagan the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected that the second sale after the death of the grandfather was improper. The Court determined that the second sale actually made under the decree of the Court before the Master could not be considered as improperly made; that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather.”

(a) 1 B. C. C. 500.

The case of *Fletcher v. Ashburner* (a) was also decided
 * 486 * on a similar principle, inasmuch as there was an express direction for a conversion out and out of real estate; and upon the death of the legatee, who had the whole beneficial title vested in him as money, his personal representatives were declared entitled to the estate as money. But these principles do not apply where there has been neither a sale nor a mortgage, nor any direction nor decree making a sale or mortgage obligatory on the parties. If, while there is a mere charge and before any sale or mortgage has been made or decreed, the money charged has ceased to be raisable, or has become raisable only for the benefit of the person entitled to the absolute fee, there, in the absence of express direction, the charge sinks into the estate. On these grounds I am of opinion that the will did not, according to its true construction, make the contingent interest of Sir G. Webster (No. 2) in this legacy a sum raisable out of his real, for the benefit of his personal, estate; and that, if he had died without doing any act affecting the question, the charge would, on the decease of Mrs. Chaplin, *sine prole*, sink into the real estate.

It remains to consider how far the question is affected by the subsequent acts of Sir G. Webster (No. 2); for it was argued that whatever might be the case if he had done nothing, yet that the consequence of the settlement which he executed on his marriage was to give to his personal representatives the right now insisted on. The settlement recites several charges affecting the estates created by his uncle Sir Whistler Webster, to a part of which (11,400*l.*) he was himself entitled, and to the rest of which other persons named were entitled: it then recites the legacy of 6000*l.* given by the will of his father, and another legacy of 1000*l.* given by the same will, and then, after stating it to be his intention to allow the 11,400*l.* to sink into the real estate, he conveys all the
 * 487 * property free from the 11,400*l.*, but subject to the other charges created by Sir Whistler, and to the two legacies under his father's will, to the use of himself for life, remainder to secure a jointure to his wife for her life, remainder to trustees for a term of years to secure portions, remainder to his first and other sons in tail male, remainder to his own heirs.

It was argued that this was an express keeping alive of the

(a) 1 B. C. C. 497.

6000*l.* contingently for his own benefit, and that on two grounds: first, because the property is conveyed expressly subject to the charge, and, secondly, because it was manifestly to his advantage to keep it alive in order to secure an interest, in priority to those who were to take by a title which preceded the fee. I cannot say that either of these arguments have satisfied me.

As to the first, when Sir G. Webster (No. 2) executed the settlement, he had the absolute fee subject to the charges created by Sir Whistler, and to the two legacies under his father's will. It was obviously his intention to settle the estate as free from incumbrances as he could. For that purpose he in terms extinguished both the charges to which he was entitled himself. He could not get rid of the other charges, and the mentioning them and conveying the estate subject to them was only, as I think, for the purpose of showing the state of the title, and the nature and extent of the charges to which the property was liable. When he conveyed the property subject to the legacy of 6000*l.*, he did not mean to impart to that legacy any other quality or condition than would have belonged to it if he had remained the absolute owner of the property, and had never conveyed it at all. There is no trace of any such intention. One of these qualities or incidents was, that on a certain event, which in fact happened, the legacy would cease to be *raisable. Those who took the real estate *488 under the settlement took (it is true) subject to a legacy, but to a legacy which, having regard to the situation of the parties, might never be, and, in fact, never was raisable at all. This seems to me to dispose of the point arising from the way in which the conveyance is made subject to the legacy.

But then, it is said, it was the interest of Sir G. Webster (No. 2) to keep the charge alive in order to have priority over those entitled under the settlement. I do not understand this. When the owner of an estate has also a charge on it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say that without some special act no presumption can reasonably be made of an intention to merge the charge in the fee, for that would or might be against the interest of the owner by letting in the intermediate estate or incumbrance.¹ But here the intermediate interests are created by

¹ The general rule is that where the legal title by a mortgage becomes united with the equitable title, so that the owner has the whole title, the mortgage is

the act of the owner himself, and so this reasoning has no application. At the time when Sir G. Webster (No. 2) made the settlement his contingent interest in the legacy was, so to say, in immediate contact with his ownership in fee-simple. There were prior charges over which he had no control; but there was no estate or charge whatever intermediate between his contingent interest in the legacy and his ownership of the fee. Therefore to speak of his interest in keeping the charge alive against other estates which he himself was creating is evidently to confound this case with one totally different. *Primâ facie*, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except.

General words, apt for that purpose, are invariably used, * 489 and, I was told, occur in this settlement; I am therefore * of opinion that there is nothing arising from the settlement which at all varies the case, and that the contingent interest in the legacy merged in the inheritance.

It remains only very shortly to refer to the authorities cited by plaintiff; only, however, to show that they have no bearing on the case. The first which was relied upon, was *Wyndham v. Lord Egremont*. (a) There Percy, Earl of Thomond, having a charge amounting to upwards of 18,500*l.* on estates of which he was tenant for life, with remainder to his first and other sons in tail, with the ultimate remainder to his own right heirs, died without issue, and Lord APSLEY held that the Earl was not at any time so seised of the estate as to make a merger for the benefit of the heir on whom the estate had descended; that merger must take place in the party's lifetime, and that the charge, having been a subsisting one during the Earl's whole life, remained as personalty for the benefit of his next of kin.

The next case which was relied upon, was that of *Forbes v. Moffatt*. (b) There Aaron Moffatt, being indebted to Andrew Moffatt in a sum of 27,000*l.*, after the death of the latter borrowed

merged and extinguished by the unity of possession. But if the owner of the legal and equitable titles has an interest in keeping those titles distinct, he has a right so to keep them, and the mortgage will not be extinguished. WILDE J., in *Loud v. Lane*, 8 Met. 518, 519; *Evans v. Kimball*, 1 Allen, 240, 242; *Hunt v. Hunt*, 14 Pick. 374; *Gibson v. Crehore*, 3 Pick. 475; 5 Pick. 150. See *Marshall v. Wood*, 5 Vt. 250; *Moore v. Harrisburg Bank*, 8 Watts, 138.

(a) Ambl. 753.

(b) 18 Ves. 384.

from his executors a further sum of 12,000*l.*; this sum was advanced, on consideration of John Moffatt (a brother of Aaron's) agreeing to postpone a debt of 13,000*l.* due to him by Aaron, and in consideration of a mortgage of all Aaron's Jamaica estates, which were accordingly charged with the payment of the first sum of 12,000*l.*, and then of the two several debts of 27,000*l.* and 13,000*l.* Aaron died having devised and bequeathed all his real and personal estate to John, and appointed him sole executor; John afterwards died intestate and without issue. The question there *arose between his real and personal representatives, as to *490 whether the mortgage for the sum of 13,000*l.* due to him was to be considered as still subsisting, or was extinguished by the union of the characters of owner and mortgagee, or by any acts done by him after he became owner. Sir W. GRANT held that the charge was subsisting, because it was evidently most advantageous to John Moffatt that the mortgage should be kept on foot, for otherwise he would have given a priority not only to the mortgage for 27,000*l.*, but would have let in all the simple contract debts of his brother.

The decisions in the cases of *Clarendon v. Barham*, (a) *Davis v. Barrett*, (b) and *Grice v. Shaw* (c) were all founded on the same principles, but in truth they have no bearing upon the question before me.

The result is that I think the plaintiffs have failed to make out any title, and so I think their bill must be dismissed with costs.

* In the Matter of MARY C. L. HODGES, an Infant. * 491

1855. January 12, 13. Before the Lord Chancellor Lord CRANWORTH.

A Judge in chambers is not empowered under the 26th section of the Act (15 & 16 Vict. c. 80) to entertain applications with reference to funds paid into Court under the Acts for the Relief of Trustees (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74). Such applications must originate in and be founded upon a petition presented to the Court.¹

(a) 1 Y. & C. C. C. 688.

(c) 10 Hare, 76.

(b) 14 Beav. 542.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1323.

THIS application, involving a question as to the extent of jurisdiction of a Judge in chambers, was made to the Lord Chancellor by desire of the Vice-Chancellor WOOD.

The following are the facts out of which the question arose: On the 5th of June, 1854, the Vice-Chancellor made an order in chambers, that George Curtis, the executor of the infant's father, should be at liberty to transfer the sum of 1530*l.* consols less certain costs, and also a sum of 3250*l.* consols, standing in the name of the infant's father, into Court to an account "In the matter of Mary Catherine Louisa Hodges, an infant;" and that the dividends should be paid to the infant's guardian till further order.

The Vice-Chancellor also ordered that C. Curtis and C. R. Turner, who were the surviving trustees of the marriage settlement of the infant's parents, should be at liberty from time to time, out of the dividends to accrue on the sums of 6118*l.* consols, and 4797*l.* reduced annuities, standing in their names upon the trusts of the settlement, to pay so much to the infant's guardian as, with the dividends of the funds under the testator's will, would make up 400*l.* a year.

Soon after the order had been made, the trustees of the settlement paid the two above-mentioned sums standing in their names into Court, under the Trustee Relief Act (10 & 11 Vict. c. 96).

Under these circumstances, the guardian, by summons in * 492 chambers, asked the Vice-Chancellor * WOOD for an order upon the Accountant-General to pay, out of the dividends of the stocks so paid into Court by the trustees, so much as would be sufficient, with the dividends of the testamentary funds, to make up 400*l.* a year.

The Vice-Chancellor entertained some doubt as to whether he had jurisdiction in chambers to affect the funds so paid into Court by the trustees, and whether it was not necessary in such cases to proceed in the first instance by petition.

Mr. C. M. Roupell, for the guardian, in submitting the point for the Lord Chancellor's determination, referred to the second section of the Trustee Relief Act (10 & 11 Vict. c. 96), which empowers the Court of Chancery to deal with funds paid into Court under that Act, "upon a petition to be presented in a summary way without bill;" and to the Act for the Further Relief of Trustees (12 & 13 Vict. c. 74), which is to the like effect. He

stated that the question had arisen in construing the provision in those Acts as to the mode of procedure by petition, in conjunction with the following sections of the Act 15 & 16 Vict. c. 80, namely, the 11th, 13th, and 15th, empowering the Master of the Rolls and Vice-Chancellors to sit at chambers for the despatch of business, and to exercise the same jurisdiction in respect of the business brought before them in chambers, as if they were respectively sitting in open Court, and giving to all orders so made the force of orders of the Court; he adverted also to the 26th section of the same Act, which enumerates the business that may be disposed of at chambers, expressly including applications as to the guardianship and maintenance of infants.

* He cited *Harrison v. Masselin*, (a) where the Vice-Chancellor PARKER held that the application under the Trustee Relief Act must be by petition. He referred also to the observations of Lord COTTENHAM, *In re Bloye's Trust*, (b) as to the scope and object of the Trustee Relief Act. * 493

Mr. Turner appeared for the trustees of the settlement, and referred to the 23d Order of October, 1852, which places applications in chambers on the footing of motions; and to the case of *Good v. West*, (c) where the Vice-Chancellor TURNER, alluding to the Act 10 & 11 Vict. c. 96, said that the Act has left the party beneficially interested to pursue his remedy (as to the money so paid in) under that Act, and not according to the ordinary jurisdiction of the Court. He also referred to the cases of *Re Harris* (d) and *Re Irby*. (e)

The Lord Chancellor said he would consider the question.

January 13.

THE LORD CHANCELLOR. — The Acts for the relief of trustees expressly state that the application must be by petition, and therefore, until there is a petition, the fund does not become an object to which the jurisdiction of the Court is applicable. But then it is said that by the 26th section of the Act 15 & 16 Vict.

c. 80, applications as to maintenance are to be * made at * 494

(a) 15 Jur. 1073.

(d) 2 Com. Law & Eq. 1110.

(b) 1 M. & G. 488; see p. 500.

(e) 17 Beav. 334.

(c) 9 Hare, 378.

chambers. This merely means, that such applications as could before the Act have been made to the Court, should be made at chambers; and as no application could have been made before the passing of the Act 15 & 16 Vict. c. 80, to the Court without a petition, so now no application can be made at chambers without a petition. After a petition, the jurisdiction at chambers will arise, and orders may be made.

Mr. C. M. Roupell suggested that as this was a matter from chambers, the taxing masters would not allow costs of counsel's attendance, without the certificate of the Court in pursuance of 56th Order of 16th October, 1852.

The Lord Chancellor certified accordingly, as he thought the present a proper case to be brought before the Court by counsel.

1853. July 16. November 16. Before the LORDS JUSTICES.

A mortgagee took, on the execution of his mortgage in 1844, an assignment of a term to a trustee, and, relying on it, forbore to search for judgments.

A judgment had been registered in November, 1843. The mortgagee sold in 1846 under a power of sale in his mortgage; and, on the purchaser objecting to complete without the concurrence of the judgment creditor, the mortgagee and his solicitor, and the mortgagor, to obviate the objection, made a statutory declaration, that, at the time of the mortgage, neither the mortgagee nor the solicitor had any notice of the judgment. The purchaser still insisted on his requisition, and in March, 1848, the vendor filed a bill for specific performance. During the proceedings in the Master's office, the five years from the registration of the judgment expired, and it was not re-registered till 1850: *Held*, that at the hearing, on further directions, in 1853, the purchaser could not be compelled to complete without the concurrence of the judgment creditor.¹

Held, also, that though the question was one of conveyance, yet, as it had occasioned the suit, the vendor submitting to obtain the concurrence required, must pay the costs.²

¹ See *Beavan v. Earl of Oxford*, 6 De G., M. & G. 492.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1400, 1401, 1408.

Seemle, that a title depending on the fact of the vendor having been a purchaser, without notice of a registered judgment, cannot be forced upon a purchaser.¹ On an appeal from an order on further directions, the appellant's counsel have the right to begin.²

THIS was an appeal from the decision of Vice-Chancellor STUART, directing a specific performance of a contract for sale at the suit of the vendor.

The bill was filed on the 23d of March, 1848, and stated that the plaintiff was a mortgagee with power of sale of the property in question, which was partly freehold and partly copyhold, and that on the 10th of December, 1846, he entered into the contract in question with the defendant. The contract was for the absolute purchase of the property for 1150*l.*, subject to conditions, among which was one providing, in the usual terms, that in the event of there being a defect of title as to part compensation should be allowed. The bill charged that the defendant refused to complete upon the pretence that the plaintiff had not shown and could not make a good title to the estate, by reason of the existence of two judgments. It appeared that these judgments were registered against the mortgagor, on the 6th day of May, 1843, and the 25th day of November, 1843. The bill * charged that, * 496 if in fact any such registered judgment was entered up against the mortgagor, prior to the 30th of January, 1844, the date of the mortgage, which was then in force, the plaintiff had not any notice whatever of such judgment at the time of the execution of the mortgage, or at the time when the plaintiff advanced the sum of 800*l.* secured thereby; and that the plaintiff and the plaintiff's solicitor first received notice or intimation of the existence of the two judgments, and of each of them, from the solicitor of the defendant after the date and execution of the agreement for purchase of December, 1846. The bill further charged that the two judgments, or either of them, could not now in any manner be rendered available against the plaintiff or the defendant, or any other person claiming the estate under the plaintiff as mortgagee, or under the defendant as purchaser of the estate; and as evidence thereof, the plaintiff charged that by the mortgage-deed a term of 1000 years created in the freehold parts of the estate, by a former

¹ See *Collard v. Sampson*, *ante*, 224 n. (1).

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1484, n. (8).

mortgage dated the 12th of January, 1818, had been assigned to a trustee in trust for the plaintiff, his heirs and assigns, for better securing to the plaintiff, his executors, administrators, and assigns, the due payment of the principal sum of 800*l.* and interest, intended to be secured by the mortgage, and, subject thereto, in trust for Benjamin Martindale, the mortgagor, his heirs and assigns, and to attend the inheritance. The bill further charged that all the objections raised on behalf of the defendant to the title of the plaintiff had been either satisfactorily answered on behalf of the plaintiff or waived on behalf of the defendant, or arranged between their respective solicitors, except the aforesaid objection of the defendant as to the two judgments against the mortgagor. And with respect to this objection, the bill charged that a statutory declaration had

been made by the solicitor of the plaintiff, who alone had
 * 497 acted in that capacity on the occasion of the mortgage, * as well as by the only clerks in the employment of the plaintiff's solicitor at that time, and also by the plaintiff himself and the mortgagor, and that this declaration had been tendered to the defendant. By it the plaintiff's solicitor declared in substance that he had prepared the draft of the mortgage in fee of the hereditaments from the mortgagor and others to the plaintiff, and the assignment of the above-mentioned outstanding term of 1000 years, and had, on the plaintiff's behalf, paid over the sum of 800*l.* to the mortgagor, who delivered to the solicitor the title-deeds; and that, relying on the protection which he believed the attendant term afforded, he did not search or cause any search to be made for judgments against the mortgagor or any other person to whom the lands had belonged, and that he had no notice, directly or indirectly, that there was, at the time of the execution of the mortgage security, any judgment against the mortgagor; nor had he any suspicion or intimation that any judgments or judgment had been obtained against or confessed by the mortgagor, or were or was entered up or registered against him; and the plaintiff by the same declaration declared that he had no knowledge of or acquaintance with the mortgagor, and agreed to advance the 800*l.* to him on the faith of the statements made by his solicitor of the value of the property proposed to be mortgaged, as a security for the same; and that the plaintiff had no knowledge, information, suspicion, or intimation at the time of advancing the 800*l.*, or at the time of the execution of the indenture of

mortgage, that there were or was any judgments or judgment against the mortgagor, or that he was indebted to any person or persons whosoever. The mortgagor also declared that the plaintiff's solicitor never during the investigation of the title, or at any time prior to the completion of the mortgage, inquired of him (the mortgagor) whether there were or was any judgments or judgment obtained against him or confessed * by him * 498 or entered up or registered against him, nor did he give to the plaintiff's solicitor or to the plaintiff notice or intimation of any such judgments or judgment, or any cause or reason to suspect that any such were or was in existence, and that to the best of his knowledge and belief neither the plaintiff's solicitor nor the plaintiff (to whom he was an entire stranger) had or entertained any such suspicion. The solicitor's clerks declared that in the latter part of the year 1843, and the beginning of the year 1844, they were the only clerks in the office of the plaintiff's solicitor, and that they remembered the business of the advance of a loan of 800*l.* by the plaintiff to the mortgagor, on security of a mortgage of a certain freehold and copyhold estate and hereditaments situate at Cheddington, in the county of Surrey, belonging to him, called the Ansted Brook estate, and that the business was transacted in the office of the plaintiff's solicitor in the latter part of the year 1843, and the beginning of the year 1844; and they further declared that they had no notice, directly or indirectly, that there was at the time of the execution of the mortgage, or at any other time prior thereto, any judgment against the mortgagor, nor had they any suspicion or intimation that any judgment had been obtained against or confessed by the mortgagor, or was entered up or registered against him.

By the decree, the usual reference was directed to inquire whether a good title could be made; and, if so, when it was first shown that such good title could be made.

It appeared that one of the judgments was re-registered on the 4th of November, 1850, pending the suit.

On the 24th of May, 1852, the Master made his report, * finding that a good title could be made to all the estate, * 499 except such part of the hereditaments as were of copyhold tenure, comprising three roods and twenty-nine perches or thereabouts; and he found that such good title (except as aforesaid) was first shown on the 7th of May, 1852.

On the cause coming on, on further directions, on the 4th of March, 1853, the Vice-Chancellor made the order under appeal, declaring that the plaintiff was entitled to a specific performance of the agreement, subject to compensation being made by him to the defendant, in respect of such part of the hereditaments comprised in the agreement as were of copyhold tenure, and comprising three roods and twenty-nine perches or thereabouts. And an inquiry was directed to ascertain what amount of compensation ought to be paid accordingly in respect thereof, in case the parties differed. The conveyance was directed to be settled by the Judge to whose Court the cause was attached in case the parties differed about the same. And upon the plaintiff executing and tendering to the defendant such conveyance duly executed by him (the plaintiff), it was ordered that the defendant should pay to the plaintiff the balance of the purchase-money, in respect of the hereditaments comprised in the agreement, after deducting the amount which should be payable to the defendant in respect of such compensation as aforesaid, together with interest on such amount at the rate of 5 per cent, from the 23d of January, 1847, up to the date of the certificate. And it was ordered that the plaintiff should pay to the defendant his costs of the suit up to and including the 30th of November, 1848; and it was ordered that the defendant should pay to the plaintiff the costs of the suit subsequent to the 30th of November, 1848.

* 500 * Upon the opening of the appeal a question arose as to the right to begin, and the Lord Justice TURNER referred to a case before Lord COTTENHAM, where it was held, that, on an appeal from an order on further directions, the appellant began. It was otherwise on an appeal from an original order, because it was there necessary to hear the plaintiff's evidence.

On the case being opened, their Lordships observed that the only question between the parties appeared to be one of conveyance, and not of title, and did not, therefore, properly arise at the present stage of the proceedings.

It was, however, arranged, with their Lordships' concurrence, that the point should be argued and disposed of at once.

Mr. Malins and *Mr. Hallett*, for the plaintiff. — As the law stood prior to the late Act, it is clear that a purchaser or mortgagee who obtained an assignment of a legal term to a trustee for

himself, to attend the inheritance, was effectually protected against all judgments, against the vendor or mortgagor, if the term was created prior to the date of the judgments, and the purchaser or mortgagee had no notice of them by himself or his solicitor. According to the evidence, therefore, the mortgagee was clearly protected from the judgments against the mortgagor; and there is nothing in the recent Act (8 & 9 Vict. c. 112) to deprive the mortgagee, or those coming in under him, of the protection which the term afforded to him previously to the passing of the Act; for that Act expressly provides that a term shall afford the same protection against any incumbrance, as it would have afforded had it not been merged by the Act; and shall, for the purpose of such protection, be considered as a subsisting * term. No- * 501
tice to the defendant of the judgment prior to his purchase is of course immaterial, if the vendor had no notice. The only question, therefore, is, whether the mortgagee or his agents had notice of either of the judgments. Now, it is clear upon the evidence, and was proved by the declaration before the suit, that the mortgagee had no such notice, either expressly or constructively. This is, of itself, sufficient; but if it were not, at all events on the 30th of November, 1852, the plaintiff (owing to the omission of the judgment creditors to re-register) was in a condition, as the defendant knew, and he still is in a condition, to sell the property unaffected by the judgments. For by this neglect the judgments became void until re-registered. There is no ground for saying that the re-registry could operate by relation, therefore the contract for purchase would take precedence of the re-registration; and the Vice-Chancellor so decided. We, however, submit that a good conveyance could have been made previously to the institution of the suit, without the concurrence insisted upon.

Mr. H. Stevens, for the defendant, was not called on.

THE LORD JUSTICE KNIGHT BRUCE. — A point has been argued in this case, not properly arising on the appeal; but we consented to hear the argument, at the request of the counsel on both sides, and for the sake of both parties. The question is, whether on the assumption that the purchase is to be completed, — that is, that the contract is to be specifically performed, and that the title is good, — the purchaser has a right to insist that a judgment credi-

tor shall join in the conveyance, or, which is the same thing, shall release and exonerate this property. Now, in general, questions between vendor and purchaser, of what is called doubtful
 * 502 title, arise as to the * title strictly so called. They seldom arise upon the conveyance, but it is of course possible that analogous questions—questions for some purposes substantially the same—may arise with respect to the conveyance. This appears to me to be one of those cases.

The vendor acquired the mortgage, under which he now sells, in 1844. The judgment in question was registered in 1843, and bound the estate. He completed his mortgage, however, without having searched the register, and, as it is said, without notice of the judgment. After having done this, he contracted to sell to the present purchaser, whose purchase is not yet completed; and in that state of things arrived the year 1848, and with it the termination of five years from the period of the registration of the judgment; and it is said that the Act of Parliament applies to this case either in favour of the vendor, independently of the contract to sell to the purchaser, or in favour of the purchaser by reason of that contract.

Both questions appear to me of some consequence. Setting aside for the present the existence of the term, it is not easy to see how the words of the statute can apply to the vendor, who was undoubtedly subject to the judgment at the time when he became mortgagee, because it was a registered judgment, and five years had not then elapsed since the registration. And with regard to the purchaser, who has only a contract, although great inconvenience may arise from holding that he cannot have the benefit of the Act until he shall have completed his purchase or taken a conveyance, it appears doubtful, to say the least, whether it must not be so held. The Registry Acts are so framed, that it is not possible, with due attention to the principles which regulate the pro-
 * 503 ceedings of this Court in cases of specific performance, * to say that the point can be decided against the purchaser. Therefore, independently of the term to which I am about to advert, I must hold that the purchaser has a right to reject the purchase even at the present stage, unless the concurrence in the conveyance of the judgment creditor, or a release from him, can be obtained.

Hitherto I have assumed the term of years to be out of the case.

But it is true that in the freeholds (being the larger part of this property) there is a term created some years ago. The present purchaser has notice, however, of the judgment. He cannot, therefore, by any merits of his own, claim the advantage of the term against the judgment creditor; but it is said that by the merits of his vendor he may. No doubt generally speaking, if not universally, a purchaser with notice from a vendor without notice is entitled to the same protection as the vendor was entitled to;¹ but this is a question not between incumbrancers claiming rights against the estate: it is one arising in a suit for specific performance between the person in possession, who wishes to sell the estate, and the person to whom he wishes to sell it, and the safety of the title depends for this purpose on the point whether the vendor had notice of the incumbrance. The vendor says that he had not. His agents say they had not. This is, perhaps, true; but I am not aware of any instance, and counsel have not been able to supply any to the Court, of a title depending upon such a fact being forced on a purchaser. In these circumstances I cannot venture to say that the concurrence of the judgment creditor, and a release from him, can both be dispensed with. Nor are these all the difficulties, for part of the estate is copyhold, to which the term does not extend.

* THE LORD JUSTICE TURNER. — I concur in the opinion of * 504 my learned brother: a few words will be sufficient to explain the grounds of my concurrence. The question is, whether the Court is to compel the purchaser to take the estate at the peril of having to try these questions with the judgment creditor. That depends on two points, — one as to the construction of the Acts of Parliament, the other as to notice.

With respect to the Acts of Parliament, the law on the subject is unsettled. No one can tell what, upon a question arising between the judgment creditor and the purchaser, after the completion of the purchase, would be the construction put upon the Acts. We may put one construction upon them, and other Judges, when called on to decide between the judgment creditor and the purchaser, may arrive at a different conclusion. In *Pyrke v. Wadding-*

¹ See 2 Sugden V. & P. (7th Am. ed.) [1037], 534 and cases in note; 4 Kent (10th ed.), 179 and note; 1 Story Eq. Jur. §§ 409, 410; *Boynton v. Rees*, 8 Pick. 329; *Bumpus v. Platner*, 1 John. Ch. 213; *Truluck v. Peeples*, 3 Kelley, 446.

ham (a) I fully stated my view as to the nature and extent of the doubts upon titles which should induce the Court to refuse specific performance, and I cannot hesitate now to act upon that view. I think it is sufficient, on the first point, to say that upon the Acts of Parliament in question the law is unsettled and doubtful.

Then as to the fact of notice, though the parties here may say there was no notice, it may appear upon further evidence that there was. I think that the completion cannot be enforced by the vendor without a discharge of the judgment or the concurrence of the judgment creditor who has re-registered, and of the other judgment creditor in case he should re-register before the execution of the conveyance.

November 16.

* 505 * The vendor having agreed to procure satisfaction of the judgments, it was arranged that a decree should be made for specific performance, and a question arose as to the costs of the suit.

Mr. Malins and *Mr. Hallet*, for the plaintiff. — No objection to the title has occasioned this suit, and therefore there is no ground for altering the Vice-Chancellor's order as to costs, so as to make it more favourable to the defendant. In November, 1848, the judgments were, at all events, inoperative; and although your Lordships have held it to be not quite clear that after the re-registration the purchaser would have had an unencumbered title, yet the purchaser knew the date of the registration of the judgments, and if he had thought proper to complete at any time between November, 1848, and November, 1850, he would have had an undoubtedly unencumbered title. Instead of doing so, he put the plaintiff to the unnecessary expense of an investigation in the Master's office, there being no dispute as to the title. There is no case in which a plaintiff has been ordered to pay costs of an investigation of title, when no question of title has occasioned the suit.

They referred to *Long v. Collier*, (b) *Scoones v. Morrell*, (c) and distinguished *Wilkinson v. Hartley*. (d)

THE LORD JUSTICE KNIGHT BRUCE. — *Prima facie* a vendor has

(a) 10 Hare, 1.

(b) 4 Russ. 269.

(c) 1 Beav. 251.

(d) 15 Beav. 185. See also *Abbott v. Swarder*, 4 De G. & Sm. 448.

to pay the costs to the time when a successful objection is first removed. But where it appears probable that the objection might have been removed if it had been made before the commencement * of the suit, the Court does not throw, or does * 506 not always throw, the costs upon the vendor.

The purchaser objects that judgments have been registered, and were existing on the register, and in force, at the time when the bill was filed ; judgments not intended to be satisfied by the vendor, but of which he meant the purchaser to take the risk, if any. If those judgments formed an obstacle to the vendor making a perfect conveyance without the concurrence of the judgment creditors, the vendor was not in a position to perform the contract when the bill was filed ; and the Court has decided that the existence of the judgments formed an obstacle to a complete conveyance being made without the concurrence of the judgment creditors. It is said, however, that the judgments having run out in 1848, and neither having been re-registered till 1850, there was an interval, during which the vendor was in a position to make a good conveyance without the judgment creditors' concurrence. How the case would have stood if the vendor had during that interval said, " I will pay the costs to this time if you will take a conveyance," it is not necessary to determine ; for he allowed one of the judgments to be re-registered without making any such offer, and thus was in the same position with regard to this judgment as he was at the filing of the bill. There is nothing, therefore, to relieve him from the *prima facie* liability under which he is to pay the costs.

It was contended by *Mr. Malins* that this was a question of conveyance and not of title, and that, therefore, the decree for specific performance should be as on a perfect title, with a reference to the Master to settle a conveyance, and that then the only costs which the vendor would have to pay would be the costs of exceptions as to the judgment creditors not being made parties * to * 507 the conveyance ; and a doubt crossed my mind whether the whole costs ought to fall on the vendor. But, without disturbing any rule, we think that this case rests on a distinct ground, that the necessity of the concurrence of the judgment creditors was the only substantial question in the suit. The plaintiff has brought the defendant here to have that question determined, and has failed.

Another question is as to the copyhold, to which no title has

been made. It is said that an agreement was come to with respect to the compensation to be made for this part before the suit, and that if this agreement is established the case comes within the rule of *Long v. Collier*. (a) I think, however, that on the evidence no final agreement was come to on the subject of the copyhold. There was a proposition made as to a declaration and a bond of indemnity, but that proposition as to the bond was not acceded to. I think that to the hearing before the Vice-Chancellor on further directions the costs must be paid by the vendor. Upon the appeal the point was argued by consent as to the concurrence of the judgment creditors, and we think that of the appeal there should be no costs.

The following were the minutes of the decree: —

“ Their Lordships being of opinion that John Martin, George Stone the younger, James Martin, and Robert Martin, as survivors of George Stone and Henry Stone, both respectively deceased, being judgment creditors and equitable mortgagees of Benjamin Martindale, the owner of the estates contracted by the plaintiff to be sold to the defendant, mentioned in the pleadings of this cause, and Thomas Snaggs, also a judgment creditor, are necessary parties to the conveyances of the hereditaments comprised
 * 508 * in the agreement of the 10th of December, 1846, in the pleadings of this cause mentioned, from the plaintiff to the defendant, and the plaintiff by his counsel undertaking that the said judgment creditors and equitable mortgagees shall join in and execute the said conveyance, or execute a release of the said judgments, so far as respects the aforesaid hereditaments, let the order made by the Vice-Chancellor STUART on the hearing of this cause for further directions, bearing date the 4th of March, 1853, be varied by striking out that part thereof which follows the word ‘including’ in the 21st line of the 3d page of the said order, and by inserting instead thereof the words following, that is to say, ‘the above-mentioned order of the 4th day of March, 1853.’ ”

(a) 4 Russ. 267.

PARKINSON v. HANBURY.

1853. June 8. July 19. Before the LORDS JUSTICES.

Where a plaintiff had obtained an order to sue *in formâ pauperis*, and the defendants had answered, and replication had been filed: *Held*, that the defendants could not, three years afterwards, have the order to sue *in formâ pauperis* discharged for irregularity.¹

A pauper is not entitled to have his bill dismissed without costs on an *ex parte* application.²

A pauper who has had counsel assigned to him, cannot argue his case in person.³

ON the 2d of May, 1848, the plaintiff, Mrs. Catherine Parkinson, obtained an order to sue *in formâ pauperis*. She then filed a bill in the character of administratrix, and the bill was twice amended, first on the 20th of April, 1848, and again on the 16th of January, 1849, pursuant to orders obtained for that purpose. All the defendants put in their answers, and replication was filed on the 28th of April, 1849. On the 7th of May, 1852, the plaintiff obtained, *ex parte*, an order from the late Vice-Chancellor PARKER, dismissing her bill without costs, and filed a second bill against the same parties, for the same purpose as the former.

On the 19th of November, 1852, the defendants moved *before the Vice-Chancellor STUART, that the order to sue * 509 *in formâ pauperis*, and the order dismissing the bill, might be discharged for irregularity, which, upon affidavit of service, was ordered accordingly.

The plaintiff appeared in person in support of an appeal from this order.

Mr. Bacon and *Mr. R. Pryor*, for the defendants, cited *Corbett v. Corbett*; (a) *Wagner v. Mears*. (b)

The Lord Justice KNIGHT BRUCE said that by the defendants' conduct in abstaining, for reasons good or bad, from questioning the order to sue *in formâ pauperis* for so long a period, they must

(a) 16 Ves. 407.

(b) 3 Sim. 127.

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 43, 44.² 1 Dan. Ch. Pr. (4th Am. ed.) 43, 792.³ 2 Dan. Ch. Pr. (4th Am. ed.) 42, 981.

be taken to have waived their right to object to it for irregularity; but his Lordship was of opinion that a pauper plaintiff was not at liberty to move *ex parte* to dismiss his bill without costs.

The Lord Justice TURNER concurred, and the bill was ordered to be restored to the file.

No costs of the appeal or before the Vice-Chancellor.

July 19.

The plaintiff on this day claimed to be heard in person in support of a motion.

Mr. R. Pryor objected, that, as a counsel and solicitor had been assigned to her as a pauper, she could not be heard.

Their Lordships allowed the objection.

1853. July 19. Before the LORDS JUSTICES.

A testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and, on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead: *Held*, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not.

THIS was an appeal from an order of the Master of the Rolls appointing new trustees on a claim. The ground of the appeal was that the plaintiffs, who sued as *cestuis que trustent* under a will, took no interest under it, by reason of the limitation under which they claimed being bad for remoteness. The will was dated the 17th of February, 1822, and, after devising unto John Way and

¹ S. C., 21 Beav. 478.

John Furnell, their heirs and assigns, the property in question, declared trusts as follows: "In trust to permit and suffer my said daughter Sarah Hurman, and her assigns, to receive the rents, issues, and profits thereof during her natural life, and, after her decease, in trust to pay and apply such rents, issues, and profits equally to or for the benefit of the children of my said daughter living at her decease until the youngest of such children shall have attained the age of twenty-five years, in case my said daughter shall die before such youngest child shall have attained that age; but if either of the children of my said daughter shall die leaving issue, such issue shall be paid or entitled to the share of their deceased parent; and as soon as the youngest child of my said daughter shall have attained such age of twenty-five years (in case my said daughter shall be then dead), in trust with all convenient speed absolutely to sell and dispose of all such my said freehold premises; either by public sale or private contract as they shall think expedient, and either together or in parcels for the best price or prices that can be gotten for the same. And I do direct my said trustees to pay, divide, and dispose of the purchase-money (deducting their reasonable costs, charges, and expenses) equally amongst such of the children of my said daughter as shall be then living, and the * issue of such, if any, of her chil- * 511 dren as may be then dead; but such issue to take only their parent or parents' share or shares of the same, as if divided by virtue of the statute for distributing intestates' effects." Mrs. Hurman died in 1847, leaving five sons and four daughters, the youngest child being sixteen years old when her parents died. The plaintiffs were the surviving children of Mrs. Hurman. The youngest of them had not yet attained the age of twenty-five.

Mr. Batten, for the plaintiffs, the respondents.

Mr. Goodeve, for the appellants, contended that the trust for sale was void for remoteness, and that the trust for the payment of the rents and profits after the death of the tenant for life was inseparable from the rest. He relied upon *Leake v. Robinson*. (a)

(a) 2 Mer. 363, and see *Hayes v. Hayes*, 3 Russ. 311 and 316, n.; *Judd v. Judd*, 3 Sim. 525; *Porter v. Fox*, 6 Sim. 485; *Newman v. Newman*, 10 Sim. 51; *Bull v. Pritchard*, 1 Russ. 213; 5 Hare, 567-571; *Palmer v. Holford*, 4 Russ. 403; *Vawdry v. Geddes*, 1 Russ. & Myl. 203; 1 Jarm. on Wills, 239 & seq., and cases there referred to.

THE LORD JUSTICE KNIGHT BRUCE. — We think that the good is separable from the bad, (a) if bad there is. (b) The decree is right.

THE LORD JUSTICE TURNER. — The ultimate trust is separable from the trust of the income. The plaintiffs have an interest, and the appeal must be dismissed with costs.

1853. July 21. Before the LORDS JUSTICES.

On a lease being granted, the lessee deposited it with the lessor's solicitor (who acted for the lessor and lessee), together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors, and received from them, without any authority from the lessee, the lease and the bill of exchange: *Held*, —

1. That without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors.
2. That evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights independently of express contract:

THIS was an appeal from a decree of Vice-Chancellor STUART, directing the repayment by two of the defendants (who were the appellants) of 250*l.*, being the proceeds received by them of a bill of exchange which came into their possession under the following circumstances.

In December, 1850, the plaintiff entered into an agreement with a Mr. Moffatt to lend him 500*l.* upon the terms of the plaintiff having the option of purchasing from Mr. Moffatt one-third part

(a) See *Somerville v. Lethbridge*, 6 T. R. 213; *Beard v. Westcott*, 1 T. & R. 25.

(b) See *Bland v. Williams*, 3 Myl. & K. 411; *Kevern v. Williams*, 5 Sim. 171; *Doe v. Ward*, 9 Ad. & Ell. 582; *Farmer v. Francis*, 2 Bing. 151; *Davies v. Fisher*, 5 Beav. 201; *Southern v. Wollaston*, 16 Beav. 166-168, 276; *Milroy v. Milroy*, 14 Sim. 48; *Boreham v. Bignall*, 8 Hare, 131; *Dodd v. Wake*, 8 Sim. 615.

of certain sewerage works belonging to him, at a sum then agreed upon. As part of this advance, the plaintiff, on the 30th of December, 1850, indorsed to Mr. Moffatt (without recourse) a bill of exchange for 250*l.*, which had been indorsed to the plaintiff.

Soon afterwards, Mr. Moffatt took a lease of the premises where his works were carried on, and the solicitors of the lessors, who acted also for Mr. Moffatt, retained the lease in respect of their lien for the costs of preparing it, amounting to 41*l.* 16*s.* 2*d.*, which were to be paid by Mr. Moffatt. At the same time Mr. Moffatt deposited with them the bill of exchange for 250*l.* as a further security for the costs.

* Shortly afterwards Mr. Moffatt became embarrassed in * 513 his circumstances, and the plant and machinery at the sewerage works were taken in execution. By a deed of assignment, dated the 31st of January, 1851, Mr. Moffatt assigned the lease of the premises where the works were carried on to Messrs. Bonnythen & Thompson, to secure a sum then due to them and any further sums which might become due from him to them.

The appellants acted as the solicitors of Messrs. Bonnythen & Thompson in the matter of this assignment, and according to their own statement they also acted as the solicitors of Mr. Moffatt in that and other matters. With a view to the assignment, they went to the solicitors of the lessors and obtained from them the lease, paying them the 41*l.* 16*s.* 2*d.*, and receiving from them at the same time the bill of exchange. The plaintiff then applied to Mr. Moffatt and requested him to return the bill of exchange, on the ground that the option in consideration of which the loan was to be made had, under the circumstances, become impracticable. Mr. Moffatt consented and wrote two letters to the appellants, the latter of which was as follows: "40, Ludgate Street, 3d March, 1851. Gentlemen,—I received the bill of exchange, mentioned in my letter to you of the 1st instant, of the bearer, Mr. G. T. Gibson, without giving him any consideration for it; and I request that you will deliver it up to him on his handing this to you. I am, gentlemen, yours obediently, W. B. MOFFATT."

The appellants, however, refused to give up the bill of exchange without payment of their bill of costs, which they claimed to be due to them from Mr. Moffatt in respect of all the matters in which they had acted as his solicitors. They afterwards discounted the bill of exchange * with another defendant * 514

named Healey, from whom they received the full amount for which the bill was drawn, returning him (as they stated) one guinea by way of discount. The plaintiff then instituted the present suit, charging, by his bill, that the defendant Healey had discounted the bill of exchange, having notice of the above circumstances. The prayer was, that the bill might be delivered up, and that the defendant Healey might be restrained by injunction from proceeding at law upon it, and from negotiating or parting with it.

The appellants, by their answer, stated that an express agreement had been entered into between them and Mr. Moffatt that they should hold the bill of exchange as a security for their general bill of costs. Evidence was gone into on both sides upon the point, and was of a conflicting kind.

No injunction had been moved for, the acceptors having paid the bill of exchange soon after the institution of the suit.

The Vice-Chancellor decreed the payment of the 250*l.* by the appellants to the plaintiff, with interest at 5*l.* per cent per annum, and dismissed the bill as against the defendant Healey with costs.

Mr. Malins and *Mr. T. Stevens*, for the plaintiff. — The solicitors for the lessors could confer upon the appellants no better title to the bill of exchange than they themselves had. They, however, held it as a collateral security for the costs of preparing the lease only. Those costs having been paid, the appellants ceased to have any lien or claim.

• 515 • *Mr. Daniel* and *Mr. Shapter*, for the appellants. — In the first place, the case is not one for the interference of a Court of Equity, there being now no document to be delivered up. The bill of exchange has been paid, and the demand (if any) is for money had and received merely. But if this were the proper jurisdiction, still the plaintiff makes out no title. His claim is founded upon an alleged failure of consideration; but no such failure is made out as would have entitled him to recover the bill. The case upon the evidence is one of a good sale of the bill, and of an agreement to return it in a certain event. Mr. Moffatt was a holder for value; he pledged the bill to the lessors' solicitors; then he employed the appellants to procure an assignment of the term to the mortgagees. For this purpose it was necessary to obtain possession of the lease. In doing this, the appellants

also possessed themselves of the bill of exchange. And, as the documents came into their possession in the course of their professional employment, they have a lien upon them for their bill of costs, independently of express contract, which, however, is also made out by the evidence. In *Stevenson v. Blakelock*, (a) a client gave his attorney a sum to pay a debt due from the client on which execution had issued. The attorney paid the debt, and the creditor delivered to him a lease belonging to the client which had been deposited to secure the debt. The Court of King's Bench held that the attorney had a lien on the lease for his general balance. The present case is, we submit, in principle exactly the same; and Lord ELLENBOROUGH's reasoning in *Stevenson v. Blakelock* applies to it.

They also cited *Davies v. Lowndes*. (b)

* THE LORD JUSTICE KNIGHT BRUCE. — When this bill was * 516 filed, the bill of exchange was not paid, and was specifically in the hands of the appellants or (which is the same thing) in the hands of the defendant Healey. Supposing, therefore, the substantial merits of the case to be with the plaintiff, there is, I apprehend, jurisdiction in this Court to entertain the suit; and the subsequent payment of the bill, and the possession by the appellants of the money instead of it, make, I apprehend, no difference. It has been observed, and not without accuracy, that the bill in this case does not represent correctly all the circumstances. But the true circumstances must of course have been known to the appellants, and it is enough if the bill contains a sufficient statement on which the plaintiff's equity can be founded. If there had been inaccurate statements in the bill of a nature likely to mislead the appellants in framing their defence, the result might have been different. I am of opinion that they were not misled, and that the manner in which the case is stated in the bill can make no difference in the equities which are to be disposed of. Two or three points, which might appear to belong to the case, may without injustice be dismissed from consideration. There can be no doubt, so far as I can judge of the facts, that, as between Mr. Moffatt and Mr. Gibson, it became (in

(a) 1 Man. & S. 535.

(b) 3 C. B. 823.

point of what is called honour, if not of actual right) the duty of Mr. Moffatt in the state of his circumstances, and with regard to the transaction of the 30th of January, 1851, to deliver back the bill of exchange to Mr. Gibson. I do not say that Mr. Gibson had at that time any enforceable right to have it returned, but, as between him and Mr. Moffatt, his claim had ripened into a right, if not before March 3d, at least on that day. However incor-

rectly the order of Mr. Moffatt to the appellants, dated on * 517 that * day, may have been and probably was worded, there is no doubt but that the intention of the transaction was to revest in the plaintiff completely, as between him and Mr. Moffatt, the title to the bill of exchange. And I apprehend that in equity the effect of what was done on that day (if not of what had been done before) was, that, although Moffatt had incumbered the bill with a debt from him to the lessors' solicitors, still, as between Moffatt and the plaintiff, it was the duty of Moffatt to discharge the bill of exchange from that lien. This might have created a difficulty, but for the fact that the debt of the lessors' solicitors has been discharged substantially out of funds belonging to Moffatt. That being so, all the rights and equities which might have existed if the debt had not been discharged may be dismissed from consideration. Then the case being delivered from all question as to the 41l. 16s. 2d., and from all question as to the title of the plaintiff, the point arises as to the paramount right claimed by the appellants. They claim it by way of lien, either of dormant lien or of lien by express agreement. But how did they acquire possession of the security, without which there could be no lien? The lessors' solicitors had a demand on Moffatt for the preparation of the lease, and had in their hands not only the lease, but the bill of exchange belonging at that time to Moffatt. In the course of the transaction of the business it became material to have the lease, and the appellants went to the lessors' solicitors and took the lease, paying their demand. They then found, for the first time, that the lessors' solicitors had, as a security for the same demand, this bill of exchange. Now it was an act in the proper discharge of their duty to obtain the lease; and, though they had no express authority so to do, it may be that the money which was actually paid gave them not only a personal demand against Moffatt, but gave them also the same rights as the lessors' * 518 solicitors had in the lease and the * bill of exchange. But

they contend that they thereby acquired a general lien upon the bill. To that argument I am unable to accede. The other solicitors held it for a specific purpose, and upon an express contract. The appellants could not, without the sanction of their client, obtain any better or higher right than the other solicitors had. In *Stevenson v. Blakelock*, (a) there was express authority to complete the transaction as it was completed.

It is said that the right of the appellants was at all events converted afterwards into a general lien by express agreement. On that point the evidence is contradictory. This, however, was a dealing between solicitor and client; and I apprehend that before it was competent for the appellants to enter into a binding agreement with Moffatt, it was incumbent upon them fully and exactly to explain to him his rights. This does not appear to have been done. Without intending any disrespect to these gentlemen, I am of opinion that, claiming such a right, they must clearly prove their case, and they have not done so to my satisfaction. On these grounds the plaintiff has, I think, established his title, not merely against Moffatt, but against the appellants; and in all substantial respects the decree must stand.

The Lord Justice TURNER, after stating the facts of the case as above detailed, said: The question whether the appellants, by possessing themselves of the bill of exchange, acquired a general lien upon it, seems to me to depend on this other question, — What was the duty which the solicitors of the lessors owed to Moffatt? They had received the bill on a special deposit, to secure a particular debt. On * that debt being discharged, their plain * 519 duty was to deliver the bill, not to the appellants, but to the person from whom they had received it. I think the solicitors of the lessors were mistaken in delivering the bill to the appellants. At all events they could not by so doing create a fresh charge upon it. The lessors' solicitors could not set up any general lien, the bill having been deposited with them on a special contract, and I do not see how they could incumber the bill beyond the extent of 41*l.* 16*s.* 2*d.* If that sum had remained unpaid the appellants would have stood in the place of the lessors' solicitors for the amount, but I cannot admit the right of the appellants to deal

(a) 1 Man. & S. 535.

with the bill otherwise than according to the special contract. *Stevenson v. Blakelock* (a) does not support the argument of the appellants, for there the money was in the hands of the solicitor for the purpose of paying off a debt. The payment of the debt drew with it the redelivery of the mortgage-deeds. But the payment here did not draw with it the right to the bill of exchange. I think that by the acquisition of the bill of exchange the appellants acquired a security for no greater amount than the 41*l.* 16*s.* 2*d.*

Then comes the question, whether there was a subsequent special contract between the appellants and Moffatt. That rests upon the evidence of one of the appellants, opposed as it is by the testimony of Mr. Moffatt. If it had been material to decide the question of fact, I should have wished to have had a *viva voce* examination. But I think that the case does not turn on that question, because if there was a special contract it was the duty of the appellants, before they allowed Moffatt to enter into it, to explain to him fully that they had no right to retain the bill, independently of contract, * as a security for any greater amount than 41*l.* 16*s.* 2*d.* It is not suggested that any such explanation was given.

Decree affirmed, with a variation directing payment of interest at 4 per cent instead of 5 per cent.

DUFAUR v. SIGEL.

1853. July 21, 22, 23. Before the LORDS JUSTICES.

Under the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, § 8, it is the duty of an attorney to enrol the articles of his articulated clerk, and where he had omitted to do so the Court dismissed a claim to foreclose a mortgage given to secure the premium.

On dismissing a claim, the Court may direct the defendant to pay the costs of any scandalous and impertinent portions of his affidavits.

Quære whether it can also order the defendant to pay any portion of the costs of the suit.

(a) 1 Mau. & S. 535.

THIS was an appeal from a decree of Vice-Chancellor STUART on a claim. The facts appear sufficiently from the judgments.

Mr. Malins, Mr. Ogle, and Mr. H. Stevens, for the plaintiff.

Mr. Wigram and Mr. Elderton, for the defendant.

Mr. Ogle, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — This is a conflict of merits; the question being, whether the very bad case of the defendant is not equalled or exceeded by the badness of that of the plaintiff. A series of Vice-Chancellors have refused to have any thing to do with these parties, and they have accordingly now bestowed themselves here. The suit, * to repeat * 521 an expression used by me under less strong circumstances, is one for which the defence must be the apology, and the badness of which almost apologizes for the defence. The money sought by the claim to be recovered is in a sense due from the defendant to the plaintiff, and perhaps it is as clear that the defendant ought to pay it as that the plaintiff ought not to receive it.

The dispute originated and exists between an attorney and solicitor, and a gentleman who is or was his articulated clerk. The defendant choosing, or having had chosen for him, the legal profession, was articulated to Mr. Puddicombe, with whom he appears to have remained a year or two. From some unexplained cause Mr. Puddicombe and he parted, and I collect that the defendant went to India, whence he returned in 1848 or early in 1849. On his return from India he made or renewed an acquaintance with the plaintiff; and, appearing then to have thought of resuming his profession, he placed himself in the plaintiff's office as clerk, and, as I suppose, gratuitously. After he had remained there some time, the articles in question were executed, by which the defendant became the articulated clerk of the plaintiff for five years from September, 1849 (when the defendant was in his twenty-third year), in consideration of a premium of 150*l.* By the articles this premium of 150*l.* is mentioned as having been received, and the defendant is expressed to be released from it in the usual form. It was not, however, paid. But the articles were accompanied by a memorandum, not under seal, promising to pay the amount, and

also by a document, the subject of the present suit, viz., an agreement to charge by way of equitable mortgage certain property of the defendant with the 150*l*. This was in September, 1849. The service appears to have continued for some months, not, * 522 however, with *satisfaction to the plaintiff, for it is to be inferred from the evidence that the defendant's habits were irregular and idle. A letter of remonstrance, which is in evidence, strengthens this view. At last, in 1850, the defendant quitted the office, not being desired to do so by the plaintiff, and his employment was never resumed. His departure was final, and the separation seems to have been equally agreeable to the plaintiff and himself. But the 150*l*. remained unpaid. The service, such as it was, I repeat, was to be taken as having commenced in September, 1849, and continued to some time in 1850. The plaintiff having still thought it right, though the service was discontinued, to demand the premium, which it was inconvenient or not agreeable to the defendant to pay, brought an action for it, and the action was met by three pleas: first, "never indebted," true or untrue; secondly, "payment," utterly untrue; thirdly, "a release," namely, the deed, which had, against the truth of the case, acknowledged the money to have been paid. The plaintiff was advised, and perhaps correctly advised, that it was vain to pursue the action under such circumstances, and accordingly suffered a *non pros.* to be entered, and thereupon he filed the present claim, for the purpose of making available the equitable mortgage which I have mentioned. It was met by a defence upon affidavits, charging the plaintiff with gross neglect of his duty to the defendant, habitual drunkenness, immorality, profligacy, and incapacity, in terms so gross and to such an extent that it is impossible, in my judgment, not to impute to this testimony the most censurable exaggeration, to use the lightest term. This led to other affidavits on the part of the plaintiff, and much evidence of more or less relevancy is thus imported into this unhappy suit.

Fortunately there is a fact, which, in one view of the * 523 case, is sufficient, according to my judgment, to dispose * of it; namely, that the attorney and solicitor did not make or cause to be made the requisite affidavit for enabling the articles to be enrolled, and accordingly they were not enrolled. Now the Act of the 6th and 7th of the Queen provides, "That whenever any person shall, after the passing of this Act, be bound by con-

tract in writing to serve as a clerk to any attorney or solicitor as aforesaid, the attorney or solicitor to whom such person shall be so bound as aforesaid shall, within six months after the date of every such contract, make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits of such attorney or solicitor having been duly admitted, and also of the actual execution of every such contract by him the said attorney or solicitor, and by the person so to be bound to serve him as a clerk as aforesaid; and in every such affidavit shall be specified the names of every such attorney or solicitor, and of every such person so bound, and their places of abode respectively, together with the day on which such contract was actually executed; and every such affidavit shall be filed within six months next after the execution of the said contract with and by the officer appointed or to be appointed for that purpose as hereinafter mentioned, who shall thereupon enrol and register the said contract, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit, and also upon the said contract." The Act also provides (§ 9), "That in case such affidavit be not filed within such six months, the same may be filed by the said officer after the expiration thereof, but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said Courts of Law or Equity shall otherwise order."

In the present case, the six months had passed before the defendant had finally quitted the office and employment * of * 524 the plaintiff, and accordingly, therefore, the service of the defendant could not count except from a time which never arrived, namely, the period when the affidavit should have been filed for the purpose of procuring enrolment; unless a Court, in the exercise of its discretion, should order that the affidavit might be filed subsequently, as allowed by the statute. It is impossible for us to say whether, in a state of things which has never existed, the Court would have so ordered; and, accordingly, the defendant never has been in a position in which his services could count, and I must hold that position to have been occasioned by a neglect of duty on the part of the plaintiff; a duty thrown upon him by the Act of Parliament. It would have been incumbent on the plaintiff to perform this duty, if the defendant had been a minor; and it not the less became the attorney's duty because the clerk hap-

pened not to be a minor, and happened to have received some previous instruction, and to have had some previous experience. Now, whether, if this case had been made in a Court of Law, the circumstances would have been a defence, I am not here to consider. But I apprehend that a cross action might have been brought by the clerk against the attorney for a neglect of duty to the disadvantage of the clerk. We are not bound to send the parties to a Court of Law, either by re-forming the deed, or upon admissions; for whatever doubt may at any former time have existed on this point is now removed by the 62d section of the Act for the Improvement of the Practice in Chancery.

My impression formed upon the undisputed facts is, that if this matter had arisen before a Court of Law in a shape calculated to raise the point, — either in one action, if in one action it could be tried, or in an action and a cross action, if in one action it
 * 525 could not be tried, — * the result would have been that the attorney could not have recovered, or, if he had, he would have lost in the one what he would have gained in the other.

The consequence, without entering into more prolonged investigation of the matter, is, that the title of the plaintiff has failed. An undertaking has been given. From this undertaking I see no reason to relieve the defendant.

There is much to regret on both sides; I think that the plaintiff was ill advised in bringing this claim forward at all; but when brought forward, it certainly should have been met in a different manner. It has been met in a manner neither justifiable nor excusable. I have had considerable doubt, and have looked with my learned brother into several cases upon the question, of directing costs to be paid by a defendant where there is neither a fund to be administered nor an estate in dispute, and where a plaintiff's case fails. (a) Without saying that the jurisdiction does not exist, I think it a jurisdiction of considerable delicacy and difficulty. But in the particular circumstances of this case, looking to the manner of proceeding on both sides, I am not disposed to take that course. I am, however, perfectly satisfied that there are here, if not entire affidavits, at least passages of affidavits filed by the defendant which go beyond the ordinary and proper license, — which go into the private life, truly or untruly, of the plaintiff,

(a) See *Tidwell v. Ariel*, 3 Madd. 409; *Thomason v. Moscs*, 5 Beav. 81.

and into his general habits, in a manner which cannot be requisite. I am sure that there is impertinent matter in these affidavits upon the part of the defendant. According to the present practice of the Court, this is a proper stage of the * cause for * 526 adverting to that circumstance. For, by the 17th section of the 15th & 16th of the Queen, c. 86, and the 30th order of the 7th of August, 1852, the Court has expressly authority to direct the costs occasioned by any impertinent matter introduced into any proceeding to be paid by the party introducing the same, upon application being made to the Court for that purpose; and the application is to be made at the time when the Court disposes of the costs of the cause or matter, and not at any other time.

The course, then, which it seems fit to follow in this more than unlucky contest, is to order the defendant to pay to the plaintiff 20*l.* for the impertinent matter contained in the affidavits, and, on the payment of that sum and of the 21*l.* which he undertook to pay before the Vice-Chancellor, to dismiss the appeal without costs.

THE LORD JUSTICE TURNER. — This is a claim filed by an equitable mortgagee, to which the defence set up is, that the plaintiff has no right to recover any part of the money secured by the equitable mortgage, or, at all events, that he is not entitled to recover the whole of that amount. The mortgage was made for securing a premium payable upon articles of clerkship to an attorney, and it appears that the articles of clerkship were never enrolled. I am satisfied that, upon the construction of the Act of Parliament, the duty of enrolling the articles rests on the master, and not on the clerk; for the provisions of the Act apply to infants, and it could not be the intention of the legislature to devolve upon an infant of fourteen years of age the duty of having his articles enrolled. In this case, therefore, the duty of enrolling the articles was that of the plaintiff, and he has not performed it. * I do * 527 not enter into the question, whether, notwithstanding that breach of duty, the plaintiff could recover at law the whole of the premium. Assuming that he could, there might be a cross action on the part of the defendant for damages in respect of the plaintiff's default in not having enrolled the articles; in which cross action damages would be recoverable, and might, perhaps, be recovered to

the full amount of the premium. If we were to get at the justice of this case by directing proceedings to be taken at law, we ought probably to direct two actions, one to be brought to recover the 150*l.*, and another by the defendant to try what damages he is entitled to; but, looking at the whole case, I am satisfied that the plaintiff ought not to recover the whole of the 150*l.*, and the defendant having submitted to pay a proportional part of the premium, I think we shall do justice by dismissing this claim upon that payment being made. The plaintiff coming into equity must submit to do what is equitable. Whether the defendant was bound to pay the proportionate part of the premium it is unnecessary for us to give any opinion, as he has submitted to make the payment; I wish, however, to guard myself against being supposed to have intimated an opinion that the plaintiff is entitled to receive any thing.

Upon the question of costs, I think that this claim ought not to have been filed, but that the defendant was not justified in making the charges he has made against the plaintiff, which, as to the greater part of them, appear to me to be wholly irrelevant. I cannot part with the case without expressing my disapprobation of the conduct of both the parties.

SEACOME *v.* HOLME.

1853. February 23, 25. July 25. Before the LORDS JUSTICES.

Semble, that a devise on trust to sell and dispose of property, consisting partly of an undivided share, does not authorize the trustees to concur in a partition.²

But where trustees had, under such a trust, concurred in a partition which was shown to be beneficial to the *cestuis que trustent*, who were infants, the Court, on a claim to which the infant *cestuis que trustent* were parties, made a decree

¹ S. C., 16 Beav. 223.

² Lewin Trusts (5th Eng. ed.), 316; Bradshaw *v.* Fane, 2 Jur. N. S. 247; 8 Drew. 534.

that the lands should be taken to be divided according to the partition already made.¹

A testator devised land subject to payment of his debts to A. and B., their heirs and assigns, and he authorized his executors thereafter mentioned, with the approbation of his trustees for the time being, to sell any part of his estates: *Held*, that the surviving executor, with the assent of trustees appointed by the Court of Chancery (in whom the devised lands were vested by a vesting order), could make a good title.²

THIS was an appeal from the decision of the Master of the Rolls upon a special case. The hearing below is reported in the 16th volume of Mr. Beavan's Reports.(a)

The questions for the opinion of the Court were:—

1. Whether a deed of partition was valid and binding as against persons claiming or beneficially interested under the wills of three testators, one of those wills (that of a testator named William Fairhurst) containing no specific power to concur in a partition.

2. Whether the will of another of the above testators, named Joseph Harrison, empowered his surviving executor, with the assent of trustees appointed under the Trustee Act, 1850, to sell the estates devised by that will.

(a) Page 223.

¹ See 2 Lead. Cas. in Eq. (3d Am. ed.) [402], 645; *Stanley v. Wrigley*, 3 Sm. & Giff. 18.

² See *Lewin Trusts* (5th Eng. ed.), 432; *Tainter v. Clark*, 13 Met. 220, 225; *Treadwell v. Cordis*, 5 Gray, 341; *Warden v. Richards*, 11 Gray, 277; *Wells v. Lewis*, 4 Met. (Ky.) 269; *Wardwell v. McDowell*, 31 Ill. 364; *Shelton v. Homer*, 5 Met. 462, 465–467; *Peter v. Beverly*, 10 Peters, 564, 565; *Franklin v. Osgood*, 2 John. Ch. 19; S. C., 14 John. 527; 4 Kent (11th ed.), 325–327; *Meakings v. Cromwell*, 2 Sandf. (N. Y.) 512; *Miller v. Meetch*, 8 Barr, 417; *Zebach v. Smith*, 3 Binn. 69; *Muldrow v. Fox*, 2 Dana, 79; *Conover v. Hoffman*, 1 Bosw. (N. Y.) 214; *Gray v. Lynch*, 8 Gill, 403; *Wilburn v. Spofford*, 4 Sneed, 698; *Williams v. Otey*, 8 Humph. 563. In *Putnam Free School v. Fisher*, 30 Maine, 526, 527, SHEPLEY C. J. said: “When an estate is devised to executors *eo nomine* in trust, the devise is made to the official, not to the individual persons, and the whole trust vests in those who accept it and become executors of the will; and when an estate is so devised, or when the executors have by the will a power to sell, coupled with an interest in trust, a conveyance by survivors, or by those alone who accept the trust, will be good.” The cases and authors above cited sustain this doctrine. 4 Kent (11th ed.), 325–327; *Shelton v. Homer*, 5 Met. 462, 465–467; *Tainter v. Clark*, 13 Met. 220, 225; *Williams v. Otey*, 8 Humph. 563. As to what is meant by interest, or interest in trust, in this connection, see *Gray v. Lynch*, *Wilburn v. Spofford*, *ubi supra*.

The following were the material facts with reference to the questions decided upon the appeal.

On the 3d of February, 1832, Joseph Harrison, Thomas Harrison, and William Ravenscroft agreed to purchase lands at Birkenhead. The agreement was entered into by Joseph Harrison, * 529 so far as regarded his * share and interest in the intended purchase for the common benefit of himself and of William Fairhurst equally, and William Fairhurst paid and contributed his due proportion of the purchase-money for the lands, being one-sixth part thereof.

Joseph Harrison died in 1832, having made his will, dated the 1st of July, 1832, which was as follows: "I give and devise all my freehold estates, subject to the payment of my debts and legacies, unto and to the use of William Ravenscroft, of Birkenhead, merchant, and John Fisher, of Liverpool, wine and spirit merchant, their heirs and assigns, upon the trusts hereinafter mentioned. I direct all my contracts for the sale or purchase of property to be fulfilled. I authorize and empower my executors hereinafter mentioned, with the approbation of my trustees for the time being, to sell and dispose of, by private contract or public auction, from time to time, all or any part of my said freehold estates, and to exchange the same, or any part thereof, for other freehold or leasehold property of equal value, or which may, by the payment of money on either side, be made of equal value, and to make partition of such parts as I may be interested in with other persons. I authorize my executors to carry on my business, and employ all proper persons therein for the benefit of my estate, if the same can be carried on profitably, until my son George shall attain twenty-three, and that my business be then given up to him for his own advantage. I direct my executors to collect, get in, and convert into money all my personal estate, and to act in relation thereto by giving time, receiving securities, and settling disputes by arbitration or otherwise, as they shall deem prudent. Further, I direct my said executors, with such approbation as aforesaid, and in the names of my trustees, to invest the moneys which may be derived from such sale or exchange, or * 530 * from my personal estate or my business, if carried on after my decease, in government or real securities, or to purchase in the names of my trustees for the time being such other real or leasehold property as my trustees shall approve of; and I

authorize my executors, with such approbation, from time to time, to vary the said securities, and resell the purchased property." And the testator declared that the receipts of his trustees should be good discharges, and appointed Thomas Seacome and Thomas Brassey executors of his will.

By indenture of lease and release of the 1st and 2d of February, 1833, the land agreed to be purchased was conveyed unto and to the use of Thomas Harrison, William Ravenscroft, and John Fisher, their heirs and assigns for ever.

By a deed-poll, dated the 9th of February, 1833, executed by Thomas Harrison, William Ravenscroft, and John Fisher, it was declared that the names of Thomas Harrison, William Ravenscroft, and John Fisher were made use of in the above indentures as trustees only, upon trust that they, their heirs and assigns, should, from time to time, and at all times thereafter, absolutely manage and regulate the sale and letting of the premises and the distribution of the rents and profits thereof, and for that purpose should receive the rents; and upon further trust that they, the said Thomas Harrison, William Ravenscroft, and John Fisher, and their heirs, and the trustees for the time being, and their heirs, should, when they or the trustees for the time being, or the major part of them, or of the trustees, might think proper, make sale and dispose of the premises, or any part thereof; and it was thereby declared, that if at any time thereafter the major part in value of the owners entitled to the said trust estate should consent and require that the said trust * estate, or such * 531 part thereof as might be then remaining, should be finally divided, then and in such case the said Thomas Harrison, William Ravenscroft, and John Fisher, or the trustees for the time being, should and would proceed fairly and equitably to divide and distribute the same in the proportions and in the manner following: that was to say, to Thomas Harrison, one-third part thereof; to William Ravenscroft, one other third part thereof; to William Fairhurst, one-sixth part thereof; to Thomas Brassey and Thomas Seacome (as such executors as aforesaid), and the said William Ravenscroft and John Fisher (as such devisees as aforesaid), one other sixth part of the residue thereof.

Thomas Seacome died previously to the date of the agreement for partition of the 26th of October, 1843, hereinafter mentioned,

leaving Thomas Brassey, his co-executor under the will of Joseph Harrison, him surviving.

William Fairhurst received one-sixth part of the rents and profits of the said lands from the date of the purchase up to the time of his decease; but the case stated that no evidence could be obtained of his having ever assented to or acquiesced in the provisions of the deed of the 9th of February, 1833.

William Fairhurst, by his will, dated the 22d of February, 1839, after giving an annuity and appointing George Law and Edward Tilston his executors and trustees, devised as follows: "I give, devise, and bequeath all my real and personal estate and effects, subject to the above bequest and devise, unto and to the use of my said trustees, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof, upon trust, as
 * 532 to such part thereof as I hold in mortgage * or trust or subject to any equity, to carry into effect the trust thereof: and as to the residue of my said real and personal estate, to sell and dispose thereof at their discretion; and I declare the purchasers of my estate shall not be bound to see to the application of the purchase-money, and that the receipts of my trustees, or the survivor, shall be in all cases sufficient."

The testator, William Fairhurst, died in the month of March, 1839, and Edward Tilston disclaimed, by deed-poll of the 25th of May, 1839, the devises and trusts contained in the will.

On the 26th of October, 1843, articles of agreement for a partition were executed by and between Thomas Harrison of the first part, William Ravenscroft of the second part, William Ravenscroft and John Fisher (as devisees in trust of Joseph Harrison) and Thomas Brassey, who had survived Thomas Seacome, executor of Joseph Harrison, of the third part, and George Law (devisee in trust and executor of William Fairhurst), of the fourth part. In pursuance of this agreement, and in accordance with the provisions thereof, a surveyor therein named divided the land.

Thomas Harrison died on the 20th of December, 1844, before the allotment was completed, having made his will, under which Thomas Rimmer and Gilbert Harrison were devisees in trust. After the decease of Thomas Harrison the surviving parties to the agreement of the 26th of October, 1843, and the devisees in trust of Thomas Harrison, drew lots for the several portions of land

which had been so divided and allotted by the surveyor in the manner provided by the agreement, and conveyances were executed carrying the partition into effect.

* By an order dated the 20th of December, 1851, made * 533 upon a petition presented in the matter of the trusts of the will of Joseph Harrison, deceased, and of the Trustee Act, 1850, by the children and issue of Joseph Harrison, stating that Thomas Girvin, one of the trustees, was resident in Canada, it was ordered that Samuel Holme and John Ravenscroft (two of the plaintiffs) should be appointed new trustees of Joseph Harrison's will, and that the lands devised by that will to William Ravenscroft and John Fisher as trustees thereof (except such portions of the lands as had been subsequently conveyed to any purchasers thereof) should vest in Samuel Holme and John Ravenscroft, their heirs and assigns, as such new trustees.

By an agreement in writing, dated the 9th of February, 1852, made between and signed by the plaintiffs and defendant respectively, the plaintiff Thomas Brassey, with the approbation of the plaintiffs Samuel Holme and John Ravenscroft, contracted to sell to the defendant a piece of land, parcel of the lands comprised in the partition deed. The defendant refused to complete the contract, on the ground that the partition was not binding upon the persons beneficially interested in the lands under the wills of Joseph Harrison, Thomas Harrison, and William Fairhurst respectively; and that, even if the partition was valid and binding, the will of Joseph Harrison did not empower the plaintiff Thomas Brassey to sell.

The Master of the Rolls decided both the questions submitted to the Court as above mentioned in the negative.

Mr. Malins and *Mr. C. Hall*, in support of the appeal. — Upon the first question, that as to the power of the * trustee of Mr. Fairhurst's will, the Master of the Rolls * 534 considered the point to be determined by *M'Queen v. Farquhar*. (a) The cases, however, are, we submit, distinguishable. In *M'Queen v. Farquhar* the question was as to the legal estate depending on limitations under a power operating under the Statute of Uses. In that case Lord ELDON said, "I conceive that, where there is a conveyance by lease and release to uses, with

(a) 11 Ves. 467.

power to alter the uses by an instrument, the terms and limitations of which are prescribed by the general law, the new use will not arise except under the very circumstances in which it is contracted that it shall arise." (a) The same observation applies to *Attorney-General v. Hamilton*, (b) which was relied upon by the respondents in the Court below. In that case Sir T. PLUMER thus expressed himself: "It is said, that an exchange under a power is not altogether like an exchange at common law, and I admit it is not entirely so. But it is difficult to discover how, in a conveyance of this nature, any new use can arise, unless the terms and limitations of the power are observed according to the contract." The question here does not depend on the Statute of Uses. This is a trust to sell which cannot be advantageously exercised without a preliminary partition. Such a preliminary step must be within the scope of the trust, especially as the words "dispose of" are added.

[THE LORD JUSTICE KNIGHT BRUCE.—I would willingly follow any authority giving such a construction to these words, but I am not aware of any. Might not a good title be made by a partition suit in which the present partition might be adopted if found beneficial? A commission would not be necessary.]

* 535 * *Mr. Druce* referred to *Gaskell v. Gaskell*. (c)

It was then arranged that this part of the special case should stand over, and that a suit should be instituted.

Upon the second question, *Mr. Malins* and *Mr. C. Hall*.—The surviving executor, with the assent of the trustees appointed by the Court, can make a good title. *Houell v. Barnes*. (d) The trustees appointed by the Court are the "assigns" of the trustees appointed by the will. They are also "the trustees for the time being" of the will. But the charge of debts is sufficient to authorize the sale by the executors. *Forbes v. Peacock*. (e)

(a) 11 Ves. 475.

(b) 1 Madd. 214–224.

(c) 6 Sim. 643. On January 25, 1855, Vice-Chancellor STUART decreed a partition without a commission in *Stanley v. Wrigley*, of which a report will appear in 3 Sm. & Gif.

(d) Cro. Car. 382.

(e) 1 Phil. 717.

The Lord Justice KNIGHT BRUCE referred to *Fordyce v. Bridges*. (a)

Mr. Baily and *Mr. Druce*, for the respondents, relied upon the reasons given in his Honor's judgment, (b) and cited *Newman v. Warner*. (c)

In answer to the argument that the charge of debts gave a power to either executor, they contended that the express power to sell excluded any implied power, and that, in all the cases in which the executors were held to have taken a power by implication, there was no express power.

Mr. Malins, in reply.

*THE LORD JUSTICE KNIGHT BRUCE.—At present we think * 536 that what either executor could do the survivor is competent to do.

THE LORD JUSTICE TURNER.—The case in *Croke* appears to me at present to be decisive.

The case stood over to be mentioned again on Friday, the 25th of February.

February 25.

The Lord Justice TURNER said that it might be unnecessary to decide whether the trustees appointed by the Court under Joseph Harrison's will were competent to consent to the sale; and the whole case was ordered to stand over to be disposed of with the suit for partition.

July 25.

A bill for partition was accordingly filed, and on this day came on to be heard with the special case.

The same counsel appeared as before.

One order was made upon the hearing of the cause and special case. It was as follows:—

“It appearing to the satisfaction of the Court that it will be for the benefit of the parties to this cause who are interested in the

(a) 2 Phil. 510. (b) See 16 Beav. 227. (c) 1 Sim. N. S. 457.

hereditaments comprised in the indenture of the 28th of November, 1845, in the pleadings and in the special case mentioned, and who are not *sui juris*, that the partition intended to be carried into effect by that indenture should be confirmed, their Lordships do, in the cause, order that the same be confirmed accordingly; and

do decree that the same hereditaments shall be deemed and
 * 537 taken to be parted and divided as * in the indenture of the 28th of November, 1845, provided, and shall be held and enjoyed accordingly; and do, in the special case, declare that the will of Joseph Harrison, the testator in the special case named, does empower the plaintiff Thomas Brassey, with the consent of the plaintiffs Samuel Holme and John Ravenscroft, to sell the freehold estates, subject to the trusts by such will declared of the estates devised to William Ravenscroft and John Fisher."

WELLESLEY v. WELLESLEY.

MORNINGTON v. MORNINGTON.

In the Matter of the TRUSTEE ACTS, 1850 and 1852.

Ex parte the Countess of MORNINGTON.

1853. March 14. July 15. Before the LORDS JUSTICES.

A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the Master, whereby 1000*l.* per annum was to be appointed as the plaintiff's jointure. On his refusal to obey the decree: *Held*, that under the Trustee Acts, 1850 and 1852, he might be declared a trustee of all the rights, interests, estates, and property acquired by him under the settlement, and the Court appointed a person to execute the requisite deed in his place under the Trustee Act, 1850.

THIS was a petition under the Trustee Acts, 1850 and 1852, and in the above suits, and was heard by their Lordships originally by order.

The nature of the suits appear from the report of the original

hearing, in the seventeenth volume of Mr. Simon's Reports, page 59. (a)

After the dismissal of the appeal, the Master approved of a draft deed to be executed by the defendant, the Earl of Mornington, in conformity with the decree.

By an order made in the causes by the Vice-Chancellor * KINDERSLEY, dated the 5th of August, 1852, it was ordered * 538 that the defendant, the Earl of Mornington, should, within fourteen days after service of the order, execute the deed in the order mentioned. And it was ordered that the service of that order on the earl's solicitor, and at the residence of the earl, should be deemed good service.

By another order, dated the 13th of January, 1853, after reciting (as had been proved by affidavit) that the earl had refused to execute the deed, it was ordered that a commission of sequestration should issue and be in force until the earl should execute the deed, and the Court should make other order to the contrary, unless the earl should, within seven days after notice, show good cause to the contrary.

This order was made absolute on the 8th of March, 1853.

On the 14th of March, 1853, the causes came on to be heard on further directions before the Lords Justices, when a decree was made declaring that the defendant, the Earl of Mornington, was bound to execute the engrossment of the draft indenture mentioned in the report of Master TINNEY, dated the 18th of February, 1851, which engrossment had been signed with the Master's allowance thereof in the margin. And it was ordered that the earl should execute the engrossment, when duly tendered to him for that purpose, within seven days after service of that order. And any of the parties were to be at liberty to apply as they might be advised, in case the defendant should not execute the engrossment within the time aforesaid. But the order was to be without prejudice to any question as to the validity against any person or persons, other than the defendant, the Earl of Mornington, * of the jointure in the aforesaid draft indent- * 539 ure, and in the pleading of these causes mentioned.

An order was subsequently obtained authorizing substituted service of the above decree, which was accordingly, on the 8th of June, 1853, effected in manner directed by the order.

(a) Affirmed on appeal, see 1 De G., M. & G. 501.

The present petition was then presented, praying that the defendant, the Earl of Mornington, might, under and by virtue of the above-mentioned acts or one of them, be declared a trustee for the petitioner to the extent of her annuity of 1000*l.* and all arrears thereof, of all the rights and interests, estates and property, which were acquired by or vested in him, the defendant, the Earl of Mornington, under or by virtue of the deeds of the 12th, 13th, and 15th of December, 1834, in the pleadings mentioned.

In support of the petition an affidavit was made by a clerk of the plaintiff's solicitor, stating that on the 8th of June, 1853, he wrote and addressed the following letter to the earl: —

“ My Lord, —

28, Bedford Row, 8th June, 1853.

• “ *Wellesley v. Wellesley.*

“ *Mornington v. Mornington.*

“ Having failed to effect a personal service of the order of the 14th day of March, 1853, made in these causes by the Lords Justices, and of which a copy was left with you at your house on the 2d of May last, we have been compelled, in accordance with the forms of the Court of Chancery, to obtain an order dispensing with personal service of that order and authorizing a substituted service. We now attend at your Lordship's • house with a second copy of the former order, and with a copy of the order for substituted service and with the originals thereof, and we also again bring with us the deed mentioned in the former order, and have to require your Lordship to sign it, in virtue of the direction so to do contained in the said order of the 14th March, 1853. If we do not now succeed in obtaining your Lordship's signature thereto, we have to inform your Lordship that the deed will remain at our office for your Lordship's signature for seven days from the delivery of this letter; after which time, if the deed is not signed, we shall make another application to the Court, consequent upon your non-compliance with its order.

• “ We have the honour, &c.,

“ GADSDEN & FLOWER.”

He further deposed that on the 8th of June, 1853, he attended at the residence of the defendant, the Earl of Mornington, at No. 124, Mount Street, Grosvenor Square, taking with him the deed

in the above letter referred to, being the deed mentioned or referred to in and by the order of the 14th of March, 1853, made in these causes; and that on the 8th of June, 1853, he accompanied the plaintiff's solicitor to the house or lodgings of Lord Mornington, situate at No. 124, Mount Street, aforesaid, and asked a female servant, who opened the door, whether Lord Mornington was at home; and, being answered in the affirmative, he requested to see his Lordship's man-servant, Edward King, whom he had seen at the house on several previous occasions, and who, on being asked whether Lord Mornington was at home, stated that he was, but was not to be seen, whereupon the deponent delivered to Edward King the above letter, and desired him to deliver it to his Lordship; and Edward King thereupon took the letter and went up stairs with it to Lord Mornington, and on his return stated that his Lordship * refused to see any one on business, and that * 541 the deponent thereupon delivered to and left with the said Edward King a true copy of the order of the 14th of March, 1853, and of the memorandum thereon referred to, and also a true copy of the order dated the 25th of May, 1853, and desired the said Edward King to deliver them also to the defendant, the Earl of Mornington, and that at the time of such service he produced and showed to the said Edward King the two original orders duly passed and entered.

The plaintiff's solicitor deposed that since the service of the orders no application had been made to him, or at his office, by or on the part of Lord Mornington in reference to the execution of the deed, and that the same still remained at his office unexecuted.

Mr. Freeling supported the petition. He read a letter which Lord Mornington had just sent to the plaintiff's solicitors, expressing his readiness to abide by the decision of their Lordships.

The Lord Justice KNIGHT BRUCE said that the case appeared to come within the mischief intended to be remedied by the Acts of Parliament referred to.

The Lord Justice TURNER concurred.

The minutes of the order were as follows : —

“Declare that the defendant, the Earl of Mornington, is within the meaning of the 'Trustee Act, 1850, a trustee for the plaintiff to the extent of her annuity of 1000*l.*, and the arrears thereof, of all the rights and interests, estates and property, which were acquired by or vested in him, the defendant, under or by virtue of the deeds of the 12th, 13th, and 15th days of December, 1834, in
 • 542 • the pleadings and decrees in these causes mentioned; and which rights, estates, interests, and property are mentioned and included in the engrossment of the draft indenture in the order on further directions of the 14th of March, 1853, mentioned; which engrossment he, the said defendant, is by such order on further directions ordered to execute, and let Mr. W. Flower be appointed to execute the said engrossment of the said draft indenture, in the place and stead of the said defendant, the Earl of Mornington. But this order is to be without prejudice to any question as to the validity against any person or persons, other than the Earl of Mornington, of the jointure in the aforesaid draft indenture, and in the pleadings in these causes mentioned.” (a)

BUTCHART *v.* DRESSER.

1853. July 26. Before the LORDS JUSTICES.

After the dissolution of a partnership between two share-brokers, one of them deposited with the bankers of the firm shares contracted to be purchased by the firm before the dissolution, with power to sell the shares, in order to raise the requisite funds to complete the purchase: *Held*, that the power of sale was not an unauthorized delegation of the powers of a member of a dissolved firm, but was valid and effectual.

The authority of a partner continues after a dissolution for all purposes of winding up, and, if it be unduly exercised, the remedy is by applying to the Court for the appointment of a receiver.¹

(a) See *Billing v. Webb*, 1 De G. & Sm. 716; *Rowley v. Adams*, 14 Beav. 130.

¹ See *Gowan v. Jeffries*, 2 Ash. 296; *Allen v. Hill*, 16 Cal. 113; *McKowen v. McGuire*, 15 La. An. 637; *Roys v. Vilas*, 18 Wis. 169; *post*, 544 notes.

THIS was an appeal from a decree of Vice-Chancellor Wood. The facts of the case are stated in Mr. Hare's Reports, Vol. X. p. 453. The following is an outline of them.

Messrs. Butchart & Tempest carried on business in partnership, as share-brokers, till October 11, 1844, when the partnership was dissolved. Before the dissolution Mr. Tempest had entered into contracts for purchases * of shares on behalf of the * 543 firm. After the dissolution Tempest borrowed money of the bankers of the late firm to enable him to complete the purchases, and at the same time deposited the shares as a security, with a memorandum in the name of the firm, authorizing the bankers to sell the shares. A sale having been made by the bankers accordingly, Mr. Butchart instituted this suit against them, seeking to make them liable for the value of the shares, as at the highest price at which they might have been sold since the deposit, on the ground that the sale was unauthorized.

The Vice-Chancellor held that the sale was binding on the plaintiff, who now appealed from that decision.

Mr. Bailey and *Mr. Bagshawe*, in support of the appeal. — A partner in a dissolved partnership may do all such acts as are necessary for winding up the concern. He may sell the partnership assets, but he cannot delegate this power to others. He cannot borrow money on the security of the partnership property, after a dissolution, without the consent of the other partner; but, even admitting that Mr. Tempest had power to leave the shares in the hands of the bankers as a security, the bankers had no right to sell.

Mr. Bacon and *Mr. Osborne*, for the respondents, were not called upon.

THE LORD JUSTICE TURNER. — This is a bill by one of two partners in a dissolved partnership seeking to charge the Yorkshire Banking Company with the value of a number of shares which the dissolved partnership had agreed to purchase before * the dissolution, and two points only arise in the * 544 case; first, whether the deposit made by Mr. Tempest after the dissolution was or was not valid; secondly, assuming the deposit to have been within his authority, whether a sale by the bank was or not binding on the partnership.

Now that a partner has, during the partnership, power to pledge the partnership assets for partnership purposes, cannot be denied.¹ That he has power to sell during the partnership, for partnership purposes, is equally clear.² The question, therefore, is reduced to this, whether the power to pledge or sell is or is not gone upon the dissolution. The general law is clear, that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership, for partnership purposes, as he had during the continuance of the partnership.³ This must necessarily be so. If it were

¹ 1 Lindley Partn. (Eng. ed. 1860) 229; *Brownrigg v. Rae*, 5 Ex. 489; *Gordon v. Lewis*, 7 Man. & Gr. 607; *Collyer Partn.* (5th Am. ed.) § 399; *Tapley v. Butterfield*, 1 Met. 515; *Anderson v. Tompkins*, 1 Brock. 456; *Deekard's Case*, 5 Watts, 22; *Milton v. Mosher*, 7 Met. 244.

² *Collyer Partn.* (5th Am. ed.) § 394; *M'Cullough v. Sommerville*, 8 Leigh, 415. It is within the general scope of partnership authority for one partner to sell and dispose of all the partnership goods, in the orderly and regular course of business. He may sell the whole stock in trade at once by a single contract. *Collyer Partn.* § 394; *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson v. Tompkins*, 1 Brock. 456; *KENT C. J.*, in *Pierson v. Hooker*, 3 John. 20 and in *Livingston v. Roosevelt*, 4 John. 277; *BRAINARD J.*, in *Mills v. Barber*, 4 Day, 430; *Pierpont v. Graham*, 4 Wash. C. C. 234.

³ The point settled by this and other cases seems to be, that, notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution. 1 Lindley Partn. (Eng. ed. 1860) 332-335; *Payne v. Hornby*, 25 Beav. 280; *Lyon v. Haynes*, 5 Man. & Gr. 504; *Smith v. Winter*, 4 M. & W. 461, 462. From the time the partnership ceases the partners become tenants in common of the partnership property that remains undisposed of. *Collyer Partn.* (5th Am. ed.) § 545. Neither partner can bind the other by any new contract. *Ib.* § 540 and cases cited in note. Still, until the affairs of the partnership are settled, the connection may be said in a qualified sense to continue. For the purpose of making good outstanding engagements, of taking and settling all the accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest subsists, although, for all other purposes, the partnership is actually determined. *Ib.* §§ 121, 546; 3 Kent, 63; *Story Partn.* §§ 324-328; *Yale v. Eames*, 1 Met. 487; *Parker v. Phillips*, 2 Cush. 175; *Darling v. March*, 22 Maine, 184. "There seems to be no reason why one partner may not assign a bond after the partnership is dissolved." *UPHAM J.*, in *Morse v. Bellows*, 7 N. H. 568. A partner

not, at the instant of the dissolution, it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account. Nor is there any inconvenience in this state of the law; for it is competent to any partner to apply, in case of necessity, for a receiver, and to have the affairs of the partnership wound up under the direction of this Court, and thus to prevent his partner from exercising unduly any power which he has as a partner.

It is, however, contended that in this case the plaintiff had given notice to the bankers not to pay any check drawn on account of the partnership. But it is not disputed that contracts had been entered into before the * dissolution, and the ques- * 545 tion is how those contracts were to be fulfilled; it being the duty of each party to fulfil them. One partner considered it expedient that the purchases should not be completed, but that the shares should be thrown back on the hands of the vendors. The other partner considered it right to sell the shares, and settle the contract by completion and realization. Neither partner applied to this Court in the matter. What was the necessary consequence? Was it not that the original contracts entered into before the dissolution ought to be completed, and the matter treated as remaining in the state in which it was at the time of the dissolution? It seems to me to be clear that in these circumstances of a difference of opinion between the partners, as to retaining or giving back the purchased property, and of neither of them applying to this Court, the proper course was to perform the contracts. The question arises whether Mr. Tempest had authority to raise money for the purpose of completing the purchases. If the partnership had continued there could have been no doubt on the subject, and I think that there is no doubt that it subsisted after the dissolution for the purposes of the contracts entered into during its continuance. The true solution of the question is, that if the plaintiff had reason to complain of the acts of his partner, his proper course was to apply to this Court for a receiver.

The appeal must be dismissed with costs.

The Lord Justice KNIGHT BRUCE concurred.

may pay a debt of the firm after dissolution, by assigning to the creditor a note or other demand due to the partnership. *Milliken v. Loring*, 37 Maine, 408.

1854. April 29. May 3. Before the Lord Chancellor Lord CRANWORTH.

By agreement in writing A. B. agreed to grant, and C. D. agreed to accept, a lease of lands in Jamaica for twenty-one years at a certain rent: C. D. entered into possession and died without having paid any rent: *Held*, that A. B. was not entitled to rank as a specialty creditor against the estate of C. D. in respect of the rent due.

Held, also, that the agreement and entry under it did not, in the absence of any payment of rent or any admission of rent being due, create the relation of landlord and tenant between the parties; and that the creation of that relation was necessary in order to enable A. B. to sustain his claim, even if the lands had been in England.

Held, also, that the right to treat rent as a specialty debt is incident to privity of estate, and not to privity of contract, and would not, therefore, apply to the case of lands out of England.

THIS was an appeal by Lord Ward, claiming to be a creditor of Richard Godson deceased, for the administration of whose estate the suit was instituted, against a decision of Vice-Chancellor STUART allowing exceptions to the Master's report made in the suit, whereby the Master had found that the appellant was a specialty creditor for a sum of 4000*l.*, the amount of two years' rent of certain plantations and premises in Jamaica comprised in an agreement in writing dated the 11th October, 1847, made between Lord Ward of the one part, and the testator of the other part. By this agreement Lord Ward agreed to grant, and the testator agreed to accept, a lease of the plantations in question, from the 1st December, 1847, for twenty-one years at a clear yearly rent of 2000*l.*, the lease to contain certain covenants, including a covenant for the payment of rent. The testator entered into possession of the premises, and continued in possession till his death in August, 1849, and possession of the premises was given up to Lord Ward in December following. It was alleged that the testator had admitted the rent being due, and had requested Mr. Benbow, the agent of Lord Ward, to allow him time for the payment of it.

Under these circumstances, Lord Ward claimed the sum above mentioned, and the Master allowed the claim. The Vice-Chancellor, however, took a different view of the case, and held that the agreement created no tenancy, so as to give

the lessor a right of distress or equivalent rights according to the law of England; and his Honor also expressed his opinion to be, that the law of tenure in England, which gives extraordinary and peculiar rights to the ownership of lands, could not be applied to Jamaica. Lord Ward appealed from this decision. A full report of the case, as heard before the Vice-Chancellor, will be found in the first volume of Messrs. Smale and Giffard's Reports, page 384; and the facts are also very fully noticed by the Lord Chancellor in his judgment.

Mr. Malins and *Mr. Renshaw*, in support of the appeal. — The sum of money found due by the Master, being a debt for rent, though on a parol demise, is a specialty debt: *Newport v. Godfrey*, (a) *Gage v. Acton*, (b) *Stonehouse v. Ifford*, (c) *Willett v. Earle*; (d) in *Thompson v. Thompson*, (e) Baron WOOD says, "I have been in an error all my life, unless money due for rent in respect of land demised, whether by deed or parol, be not of fully equal degree with a specialty debt." The Vice-Chancellor thought there was a want of privity of estate, but his Honor omitted to consider that this was an administration suit where the priority of incumbrancers has to be ascertained; and, in the administration of assets in this Court, it is clear that debt for rent has priority over simple contract debts. *Clough v. French*. (g) Although, by the Statute 8 & 9 Vict. c. 106, § 3, the agreement in question is void as a lease, and the holding under it would be a mere tenancy at will, yet the subsequent payment of rent would convert it into a * tenancy from year to year: *Thunder v. Belcher*, (h) *Chapman v. Towner*, (i) *Brashier v. Jackson*, (k) *Knight v. Bennett*; (l) and accounting for rent, or admitting it to be due, as in this case, is equivalent to payment. *Cox v. Bent*. (m) The principle which limits the right to distrain for rent to the particular subject of demise does not apply in cases like the present, when the contract for occupying the land has been followed by an admission of an amount due for rent. The

(a) 4 Mod. 44; S. C., 2 Vent. 184; 3 Lev. 267.

(b) Com. 67.

(c) Com. 145.

(d) 1 Vern. 490.

(e) 9 Price, 464; see p. 471.

(g) 2 Coll. 277.

(h) 3 East, 449.

(i) 6 M. & W. 100.

(k) 6 M. & W. 549.

(l) 3 Bing. 361.

(m) 5 Bing. 185.

Master has found that a certain sum of money is due for rent, there is a clear and binding agreement to enter into a covenant to pay rent, this Court will consider that as done which is agreed to be done, and the effect of this will be to give to the contract for legal priority an equitable priority. Though an agreement may not operate as a legal demise, yet still it may be valid for all other purposes, as where a defendant was bound by covenant to repair, though the agreement itself was void as to the duration of the term by the Statute of Frauds. *Doe v. Bell*, (a) *Richardson v. Gifford*, (b) *Doe v. Amey*. (c) It was contended before the Vice-Chancellor, that, as this was a contract with respect to land in Jamaica, the law of England did not apply; but by the Laws of Jamaica, 1 Geo. 2, c. 1, § 22, the laws of England are incorporated into the laws of that island; and by the English Statute 5 Geo. 2, c. 7, § 4, real estate in the plantations is made liable to satisfy debts in like manner as personal estate.

Mr. Swanston and *Mr. Goodeve*, in support of the decision of the Vice-Chancellor. — The agreement here could not take * 549 effect as a lease: the * cases cited on the other side—*Newport v. Godfrey*, (d) *Gage v. Acton*, (e) *Stonehouse v. Ifford* (g) at law, and *Willett v. Earle*, (h) *Thompson v. Thompson*, (i) and *Clough v. French* (k) in equity—are not consistent with each other, and, so far as they favour the claim of the creditor, proceed on the assumption of a demise of some sort, giving, therefore, a different right from the right to sue for use and occupation. In *Naish v. Tatlock*, (l) EYRE, C. J., says, “The action for use and occupation is in its own nature collateral to the action on a contract for rent upon a demise, and it was so held in the case of *Johnson v. May*, 3 Lev. 150; if the defendant did in fact use and occupy by the permission of the plaintiff, and had expressly promised to pay, though the plaintiff had no title, or perhaps an equitable title only, the action lay.” In *Cox v. Bent*, (m) there

(a) 5 T. R. 471.

(c) 12 A. & E. 476.

(b) 1 A. & E. 52.

(d) 4 Mod. 44; S. C., 2 Vent. 184; 3 Lev. 267.

(e) Com. 67.

(k) 2 Coll. 277.

(g) Com. 145.

(l) 2 H. Bl. 319; see p. 323.

(h) 1 Vern. 490.

(m) 5 Bing. 185.

(i) 9 Price, 464.

was an admission of the precise sum due, but there is no such admission here: what the Master finds is nothing more than an opinion of Lord Ward's agent, Mr. Benbow, as to the effect of Mr. Godson's statements to him. (a) If this case related to lands in England, the claim of Lord Ward could not be supported; still less can it be maintained as to lands in Jamaica. Supposing the law of England to be such as is stated, it is a local law of the most technical kind, and cannot be extended beyond the jurisdiction. *Noell v. Robinson*, (b) *The Earl of Winchelsea v. Garetty*, (c) *Mayor of Lyons v. East India Company*. (d) With regard to Jamaica, it has * been expressly decided that the laws * 550 of England are not binding there unless expressly introduced: *Blankard v. Galdy*; (e) and the English law of tenure has never been so introduced. The local Act 35 Car. 2, c. 13, declaring the laws of England in force, was disallowed by the Crown. [They referred to the Laws of Jamaica, 33 Car. 2, c. 12; 1 Geo. 2, c. 1, § 22; and to the English Act, 5 Geo. 2, c. 7, § 4.]

[The Lord Chancellor observed that in the case of a tenancy in Ireland created by deed, and the tenant dying in England indebted for rent, the debt to the landlord would be a specialty debt; and asked whether it would be so if the tenant had assigned to another person, and that person died in England.]

We should say it would not: the lessor cannot bring an action on covenant for rent, where there is no privity of contract. *Way v. Yally*, (g) *Naish v. Tatlock*. (h)

Mr. Bacon appeared for Mrs. Godson, who supported the decision appealed from, but took no part in the argument.

Mr. Renshaw replied. — He relied on the admission made by Mr. Godson; denied that Lord Ward could not have brought an action against Mr. Godson for the rent; referred to *Lyon v. Colville*; (i) distinguished the present case from *The Earl of Win-*

(a) See this noticed in the judgment of the Lord Chancellor, *infra*, p. 553.

(b) 2 Vent. 358.

(g) Salk. 651; S. C., 6 Mod. 194.

(c) 2 Keen, 293.

(h) 2 H. Bl. 319.

(d) 1 Moore's P. C. Cas. 175.

(i) 1 Coll. 449.

(e) 4 Mod. 222; S. C. Salk. 411.

but had said it was not convenient for him to pay then, and had asked for time, this would have been the same thing as if Mr. Godson had actually paid ; or further than this, if, at the end of the half-year, Mr. Godson and Mr. Benbow had met, and the former had said that at the end of the year 2000*l.* would become due for rent, and that he would not be able to pay, and hoped that time would be given him, this would really have come to the same thing. Though I think that would do, the evidence in this case does not amount to that ; what Mr. Benbow swears to is mere matter of inference, and had the decision turned on this point, I should have thought it necessary to direct further inquiry.

I do not, however, think it necessary to direct any inquiry, * 554 because the present appellant must maintain two * propositions : the first, that this would have been a specialty debt if these lands had been in England ; and the second, that the same rule applies to lands in Jamaica. My clear opinion is, that the Vice-Chancellor is right in saying that the same doctrine does not apply to lands out of the jurisdiction as to lands in England. The doctrine clearly arises from what is called in law privity of estate, a doctrine connected with the old feudal tenure, and with the landlord having had in ancient times a right to come on the land and oust the tenant. Whatever may have been its origin, it certainly was a right arising from privity of estate. In the case of lessor and lessee, there is privity of estate and something more, there is privity of contract also ; and it is impossible to say in an action between lessor and lessee that the right arises on either alone. That the doctrine in question arises from privity of estate, and not of contract, is manifest from this, that there is no specialty debt as to any thing recovered for use and occupation where there is privity of contract only. In the case of a tenant *pur autre vie*, where the life has dropped, and the tenant goes on occupying, the reversioner may bring his action, but he can only recover for use and occupation, and the right to recover rent as compensation for the occupation of lands, not arising out of the relation of landlord and tenant, has never been held, that I am aware of, to constitute a specialty debt.

It thus appears to be clear that the right is an incident to tenure, and not to contract ; that is, to privity of estate, and not to privity of contract. This being so, it seems to decide this case ; for, if the matter is as I have stated, it cannot be said that an

action can be maintained in this country arising out of privity of estate in another, though, if the right is by privity of contract, it applies everywhere.

* The case as to lands in Ireland, *Barker v. Damer*, (a) * 555 to which I alluded in the course of the argument, closely applies to the present: the marginal note is, "Action of debt for rent against an assignee of a term is local, and so is an action of covenant against such an assignee, because 'tis founded on the privity of estate." There an action of covenant was brought by the grantee of the reversion, against the assignee of the lessee, upon an express covenant for payment of rent reserved to be paid at London; the defendant pleaded to the jurisdiction that the lands demised lay in Ireland; it was argued for the plaintiff, that there was an express covenant to pay the money in London, and that was sufficient to draw the whole to the jurisdiction of the Court; on the other side it was said that the action was in its nature local, and was founded on privity of estate, for by the assignment of the term the privity of contract was wholly determined. "'Tis adjudged in several of our books, that an action of debt for rent against an assignee of a term is local, and will lie nowhere but in that county where the lands are," and it was contended that the same reason held in covenant which was maintainable only upon the privity of estate, and the defendant was merely charged thereby because the covenant ran with the land, for if it had been a collateral covenant the assignee would not have been bound by it, and that proved the action was local only with respect to the land. "Nota; it was agreed by all, that the grantee of a reversion may maintain an action of covenant against the lessee himself, as well in the county where the demise was made as in the county where the lands lie, because the privity of contract between the lessor and the lessee is transferred to the grantee of the reversion by the Statute of Hen. 8, &c. The Court inclined against the plaintiff, * for that they did not apprehend * 556 any difference as to this purpose between an action of covenant and debt." No judgment was actually given in the case, but the Court appears to have assumed that, if the question had been as to an action of debt, that action was local, and arose out of privity of estate.

(a) Carthew, 182.

That seems to settle the question; an action may no doubt be maintained in respect of lands in Jamaica, but that is by privity of contract, and not by privity of estate; and it is privity of estate which confers the special right claimed by the present appellant. The decision of the Vice-Chancellor is therefore correct; and the appeal must be dismissed.

LAZONBY v. RAWSON.¹

1854. November 10, 11. Before the Lord Chancellor Lord CRANWORTH.

A testator gave his leasehold estate, held for lives, to his son and his heirs, subject to an annuity of 100*l.* for his daughter for life, and charged with the payment after her death of 2000*l.* to her children, and appointed his son executor. The testator died in 1807, and his son proved his will, and his personal estate, exclusive of the leaseholds, was sworn under 2000*l.* In 1821 the son signed a document from the Legacy Duty office, professing to have retained the sum of 2000*l.*, in respect of the legacy charged on the leaseholds, and on that document there was a formal receipt by the proper officer "for 20*l.* for duty on account of the personal estate within mentioned." The lives in the lease having expired, and the lessors having declined to renew, on a bill filed by a child of the testator's daughter, against the representatives of the son to have the 2000*l.* secured: *Held*, first, that the entire leasehold interest was chargeable with its payment at the testator's death, and, secondly, that the conduct of the son with respect to the payment of the legacy duty, fourteen years after the death of the testator, amounted to a sufficient admission of assets to answer the legacy of 2000*l.*

Payment of probate duty is presumptive evidence of an admission, but not an absolute admission, of assets to the extent covered by the amount of duty paid.²

THIS was an appeal by the defendants James Rawson and James Torkington, the executors of Stephen John Charlesworth, against a decree of the Vice-Chancellor STUART declaring that there had been a sufficient admission of assets by their testator, under the following circumstances. The facts of the case are fully detailed in the second volume of Messrs. Smale and Giffard's Reports, page 267, from whence the following statement is extracted: —

¹ S. C., 1 Jur. N. S. 289; 24 L. J. Ch. 482.

² See *Hutton v. Rossiter*, 7 De G., M. & G. 9; 24 L. J. Ch. 106.

* Stephen Charlesworth by his will dated the 25th February, 1807, gave to his son Stephen John Charlesworth a messuage and several closes of land in the county of Lincoln, held under Brown's Hospital in Stamford for three lives; and the testator desired his son Stephen John Charlesworth to apply to the hospital to change one of the lives for that of his daughter Sarah Charlesworth; and he declared that the premises so devised were to be subject to an annuity of 100*l.* to his daughter Sarah Charlesworth, for her life, with power of entry and distress to secure the same; and after the decease of his daughter, the testator bequeathed to Thomas Thorpe and William Proudman and the survivor of them, his executors, &c., &c., the sum of 2000*l.* to be paid by and out of the said leasehold messuage, closes, lands, and premises which he thereby charged with the payment thereof; and in case the said leasehold estate should happen to be insufficient to pay the sum of 2000*l.*, then and in such case he thereby charged his personal estate with the payment thereof, on trust for the use and benefit of an only child or all and every the children of his daughter Sarah in equal shares. The testator appointed his son, Stephen John Charlesworth, his executor.

At the date of the will, the leasehold premises were held under a lease dated 1799, which was surrendered and a new lease granted in 1807 to the testator for the lives of his daughter Sarah and two other persons.

The testator died on the 1st March, 1807, and his will was proved in the May following by Stephen John Charlesworth; his personal estate was sworn under 2000*l.*, which did not include the leaseholds inasmuch as they were limited to the heirs of his son.

Sarah Charlesworth intermarried with Thomas Charlesworth, * and had one daughter who attained twenty-one and * 558 intermarried with the plaintiff.

Stephen John Charlesworth made his will on the 22d February, 1850, by which he devised and bequeathed his real and personal estate to the defendants Rawson and Torkington on certain trusts; he also appointed the same gentlemen his executors. He died on the 5th March, 1852, and his will was proved by his executors.

Sarah Charlesworth survived the other lives contained in the lease. The hospital — the charity having been made the subject of a commission — declined to renew the lease.

The 2000*l.* never having been raised, the plaintiff filed this bill

to have the legacy secured during the lifetime of Sarah Charlesworth.

The defendants admitted assets of their testator Stephen John Charlesworth. In order to show an admission of assets by Stephen John of his testator Stephen Charlesworth, a formal receipt signed by Stephen John Charlesworth, on the 11th December, 1821, professing to have retained the sum of 2000*l.* for the legacy of 2000*l.* chargeable on the real estate of Stephen Charlesworth, having first allowed or paid 20*l.* for duty thereon, was produced out of the custody of Sarah Charlesworth; but there was no distinct evidence to show how the receipt got into her possession. On the receipt was a formal indorsement by the proper officer at the Stamp office, to the following effect: "Received the 11th day of December, 1821, the sum of 20*l.* for duty on account of the personal estate within mentioned."

Mr. Malins, Mr. Simpson, and Mr. W. D. Lewis, for * 559 * the plaintiff, in support of the decision of the Vice-Chancellor. — We submit that the receipt signed and delivered by Stephen John Charlesworth to the Legacy Duty office, must in this Court be regarded as amounting either to an appropriation of the legacy, or to a contract, or to an act which altered the legatee's position, on the faith of which she forbore to sue. The mere payment of legacy duty by an executor has been held to be such an admission of assets as to justify an immediate decree for the payment of the sum in respect of which the duty was paid without previously taking an account of the testator's estate. *Whittle v. Henning*. (a) So payment of interest on a legacy is equivalent to an admission of assets. *Attorney-General v. Higham*. (b) Moreover, the probate duty stamp is *prima facie* evidence that the executor has secured assets to the amount covered by the stamp. *Foster v. Blakelock*. (c)

Mr. Wigram and Mr. Renshaw, for the defendants the appellants. — There are two questions raised on this appeal. The first has reference to the construction of the testator's will, viz., as to whether the whole leasehold interest was charged with the payment of the 2000*l.* We submit that the leaseholds were not

(a) 2 Beav. 396. (b) 2 Y. & C. C. C. 634. (c) 5 B. & C. 328.

charged therewith at the death of the testator, nor at the death of the annuitant: in short, that it was a postponed legacy charged on land, and cannot in law be presumed to have attached until the occurrence of the event on which it was to be raised; and, there being no intention to charge the rents and profits or that the legacy should carry interest, the reasonable inference is

* that the testator only intended to charge the leaseholds * 560 on the death of his daughter, and not until that event. In the language of Lord ST. LEONARDS in an analogous case, "It is a charge simply on the land, it is not to be raised independently of the direction to pay it. *Pennefather v. Bury*. (a) The legacy was clearly not payable out of the personal estate of the testator; and the source from whence it was to have been deriyed having failed, it follows that the legacy itself must be considered to have also failed. The bill in this case neither seeks an account of back rents, nor does it pray for a receiver, nor to charge the life-interest of the devisee with an occupation rent, and the decree, therefore, directing payment as upon an admission of assets, is a surprise on us. There has been for forty-seven years an acquiescence treating the legacy as charged on the leaseholds: and at most the claim can only be carried back six years, according to the 42d section of the Act 3 & 4 Will. 4, c. 27. The case of *Foster v. Smith* (b) was the converse of the present, but supports our view in effectuating the whole intention.

As to the acts which are alleged to amount to an admission of assets, the Vice-Chancellor has held not only that Stephen John Charlesworth received enough to pay, but that there was an admission of assets to the extent of the amount for which probate duty was paid. With respect, however, to the probate duty being evidence of the amount of the assets covered by the duty, it is to be observed that the later authorities have impugned the correctness of the decision in *Foster v. Blakelock*. (c) Thus, in *Stearn v. Mills*, (d) PARK, J., says, "The point referred to as decided in *Foster v. Blakelock* does not appear to have undergone much discussion, and I cannot concur in that decision."

* [LORD CHANCELLOR. — If an executor who has had the * 561 power of correcting a mistake in paying too much duty,

(a) 3 J & L. 727; see p. 735.

(b) 1 Phil. 629.

(c) 5 B. & C. 328.

(d) 4 B. & Ad. 657.

should not seek to get back the over-payment, it may be presumed that he did receive the whole amount in respect of which the duty was paid.]

The executor could not have applied after three years; and it might well be that he suffered that time to elapse. As to the legacy duty receipt, that, being confessedly a receipt for the amount as chargeable on real estate, of itself excludes the presumption that there was any personalty. The cases of *Whittle v. Henning* (a) and *Attorney-General v. Higham* (b) are distinguishable, because in the former there was an admission of assets, and in the latter there was a payment of interest on the legacy.

They also referred to *Clark v. Bates*, (c) *Savage v. Lane*, (d) and *Postlethwaite v. Mounsey*; (e) in which last case it was held that the mere payment of interest on a legacy to a tenant for life under a will was not conclusive as an admission of assets by the executor.

Mr. W. D. Lewis, in reply. — As to the question on the construction of the will, the present case differs from *Pennefather v. Bury*, (g) relied upon by the appellants, in this most essential particular, namely, that in *Pennefather v. Bury* there was an entire gift of the whole interest to the tenant for life; as observed by Lord ST. LEONARDS, “There is an express dedication of the whole of the rents to his widow, during her life.” Here the very opposite inference is to be drawn from the fact of the leaseholds being perishable, and the words of the will charging the testator’s personal estate in aid; “in case the said leasehold estates shall be insufficient to pay.” As to the decree being a surprise on the defendants because the bill prays an account, we submit * that there is enough alleged in the bill and admitted in the answer to warrant the decree for immediate payment. *Rogers v. Soutten*. (h) As to the Statute of Limitations being a bar to our claim beyond six years, it is to be observed that we are not asking for an account of arrears of rent, but we are asking to have a fund not yet due,

(a) 2 Beav. 396.

(b) 2 Y. & C. C. 634.

(c) 2 De G. & Sm. 204.

(d) 6 Hare, 32.

(e) 6 Hare, 33, n.

(g) 3 J. & L. 727.

(h) 2 Keen, 598.

properly secured; besides, this is a case of an express trust. The payment of the legacy duty, being deliberately made upwards of fourteen years after the testator's death, was tantamount to an acknowledgment by the person paying that he held the sum represented by the receipt in trust for the legatee, if it did not amount to a contract to pay that amount. Even a voluntary deed is binding on the grantor, *a fortiori* will a formal declaration be binding in favour of the *cestui que trust*, when the declaration is made in the execution of a trust and the performance of an obligation imposed by statute.

THE LORD CHANCELLOR. — With respect to the first point on which the appellants complain of the Vice-Chancellor's decree, I am clearly of opinion that the declaration of the Vice-Chancellor, to the effect that the whole of the leaseholds was subject to the payment of the annuity of 100*l.* to Sarah Charlesworth, and charged with the payment of 2000*l.* to her children after her death, was perfectly right; in short, that the corpus of the leasehold was in the same predicament as the personal estate of the testator, though primarily liable to the payment of the legacy. The case of *Pennefather v. Bury* (a) stands on a different footing; what Lord ST. LEONARDS there said was, that there had been an express dedication of the whole life-interest to the first taker; but that doctrine is inapplicable to a case like the present, where the legatee takes the estate expressly charged with the legacy.

* With respect to the second point of the Vice-Chancellor's * 563 decree of which the appellants complain, viz., that the plaintiff is entitled to stand as a creditor for the whole of the 2000*l.* against the estate of Stephen J. Charlesworth, as upon an admission of assets, I am also of opinion that the Vice-Chancellor arrived at a correct conclusion. It was contended, on various grounds, that there had been an admission by Stephen J. Charlesworth, and among others a good deal of evidence was adduced as to the state and value of the property belonging to the testator at the time of his death; but that has nothing to do with the question, it does not and cannot prove that the executor has ever admitted assets. With regard to the amount paid for probate duty, it was argued by the respondent that the fact of the stamp

(a) 3 J. & L. 727.

duty having been for property exceeding 1500*l.*, it was at least an admission of assets up to that amount. I have already observed during the argument, that the circumstance of an executor having paid probate duty up to a particular amount may be *prima facie* evidence of his having thought that the testator had died possessed of property represented by the amount of the stamp duty paid; but the probate duty is in the first instance payable on the whole of the personal estate left by the testator. If it cannot all be got in, and it should be ascertained that it was not of the value represented, in such a case provision is made for enabling the executor to get a return of the amount overpaid. When, therefore, an executor has not made any application for the return of the duty which he may have paid in excess, it is a step in evidence towards proving an admission of assets to the amount, though by no means conclusive evidence that the executor had made a correct estimate of the testator's property. Much might depend on the amount overpaid, and the pecuniary condition in life of the executor,

* 564 whether he would be at the trouble of getting a * return of the excess of duty overpaid. Here it is said that the executor paid 40*l.* in respect of probate duty and never got back any of it, and I think it certainly amounts to strong presumptive evidence that he had received assets to the extent covered by that amount of duty; but it is not an absolute admission that he did.

There was no other admission of assets, unless the legacy duty receipt is to be construed as such; this was the document of September, 1821, when the testator had been dead upwards of fourteen years, when the executor must have known whether or not the assets of the testator were sufficient to provide for the legacy. There being one duty payable in respect of the annuity and the 2000*l.*, the presumption is that the payment was made in respect of both. I am of opinion that such receipt, unexplained by the executor, might of itself have amounted to an admission of assets to that extent; but coupled with the possession of the document in the hands of the legatee (how it got there does not appear), and having regard to the fact that the legacy duty was paid so many years after the testator's death, when the exact state of his assets must have been ascertained, I concur with the Vice-Chancellor (though I had some doubt during the argument) that such payment, as shown by the receipt, did amount to an admission of assets. The appeal therefore must be dismissed with costs.

* KANE v. REYNOLDS.

* 565

1854. November 15, 17, 25. Before the Lord Chancellor Lord CRANWORTH.

The solicitor for the affairs of the treasury, as nominee of the Crown, having taken out letters of administration to the goods of an intestate, on the assumption that he had died without next of kin, *held*, not entitled to the costs of a suit instituted by a person rightfully claiming as next of kin.

The nominee of the Crown had successfully resisted, in a previous suit, an unfounded claim by a person wrongfully asserting a title as next of kin, and in the suit of the rightful claimant there had been the usual decree for an account, with all just allowances: *Held*, without deciding that the costs of the previous suit might have been included under just allowances, that inasmuch as no objection had been taken to the chief clerk's certificate by the nominee of the Crown, he was precluded from raising the question as to his right to the costs of defending the previous suit, when the cause came on before the Court for further consideration.

THIS was an appeal by the defendant Henry Revell Reynolds, the solicitor for the affairs of her Majesty's treasury, against an order of the Vice-Chancellor STUART, made on the 13th June, 1854, on the further consideration of a claim in which Mary Kane, as administratrix of Thomas Kane, was the plaintiff, and H. R. Reynolds and James Kane were defendants. The question involved in the appeal was as to the right of the nominee of the Crown to costs. The following are the facts of the case: In the year 1846, a person of the name of Thomas Kane died intestate. It was assumed that he had left no next of kin, and, in the year 1847, George Maule, who was then the solicitor for the affairs of her Majesty's treasury, obtained a grant of administration of the intestate's personal estate. By virtue of that grant he possessed himself properly of the personal estate of the deceased, amounting in all to nearly 10,000*l*. In the year 1848, a person of the name of James Kane asserted a title to the property, alleging himself to be the sole next of kin of the intestate, and as such he filed a bill against George Maule. There was the usual reference as to the next of kin, and the result of that reference was that though James Kane was clearly shown not to be one of the next of kin, yet that there were in existence persons who could prove themselves to be the next of kin of the *intestate, and among * 566 them the plaintiff in the present suit, Mary Kane. Her title being established, she instituted proceedings in the Ecclesiastical

Court, for the purpose of causing the letters of administration which had been granted to the nominee of the Crown to be revoked and to obtain a grant herself, and in June, 1853, she succeeded in obtaining the revocation and the grant to herself.

George Maule having died in 1851, the Act 15 & 16 Vict. c. 3, was passed, providing for the administration of the personal estates of intestates and others to which her Majesty might be entitled by right of her prerogative by a grant to the solicitor for the time being for the affairs of her Majesty's treasury, as the nominee of her Majesty.

Upon obtaining the grant from the Ecclesiastical Court, Mary Kane filed a claim against the defendant H. R. Reynolds for an account and payment to her, as such administratrix of the intestate, of the property which had been so possessed by the defendant and his predecessor in office; and on the 11th February, 1854, the Vice-Chancellor ordered that an account should be taken of the personal estate of Thomas Kane the intestate, received by the defendant H. R. Reynolds or G. Maule deceased, and that what should appear to have been received by the defendant H. R. Reynolds, or by the said G. Maule, should be answered by the defendant H. R. Reynolds; and that on taking the accounts all just allowances should be made, and that the further consideration of this cause should stand adjourned.

On the 11th May, 1854, the chief clerk certified that the plaintiff and the defendant H. R. Reynolds had attended by their respective solicitors; that the defendant James Kane had not
 • 567 attended, although duly summoned; * that the defendant H. R. Reynolds and G. Maule deceased, or one of them, had received or was charged with personal estate of Thomas Kane the intestate to the amount of 9553*l.* 8*s.* 9*d.*; and he had paid, or was entitled to be allowed on account thereof, sums to the amount of 477*l.* 7*s.* 6*d.*, leaving a balance due from the said H. R. Reynolds of 9076*l.* 1*s.* 3*d.* on that account. The plaintiff subsequently moved for the payment into Court of the balance of cash, and for the transfer of the stock specified in the certificate. The Vice-Chancellor directed the motion to come on with the cause for further consideration. Upon the 13th June, 1854, the Vice-Chancellor made an order upon H. R. Reynolds for the payment and transfer within a month of the sums found to be due from him. His Honor, however, declined to make any order as to costs.

The defendant H. R. Reynolds being dissatisfied with that order presented a petition of appeal, which prayed that it might be varied by inserting therein a reference to the proper taxing master to tax the costs of the appellant of this suit, as between solicitor and client, and by directing therein that an account might be taken of the costs, charges, and expenses properly incurred by G. Maule deceased, and the appellant respectively, in and about the defence to the cause of *Kane v. Maule*, or that it be referred to the taxing master to tax the costs of the said G. Maule, and the appellant of that suit as between solicitor and client, and by adding to the order that the appellant was entitled to retain the amount of the said costs, or costs, charges, and expenses, as the case might be, out of the cash directed to be paid by the appellant, and by substituting for the direction for payment a direction for the payment of the residue only after such retention, and that if it should appear that the appellant had in the mean time paid over the sums directed to be * paid, then that the plaintiff should be or- * 568 dered to repay to the appellant the amount of such costs, or costs, charges, and expenses, as the case might be.

The Solicitor-General and *Mr. Wickens*, for the defendant H. R. Reynolds, in support of the appeal. — We submit that the duties of the nominee of the Crown being to hold the property, which was *quasi hæreditas jacens*, for the rightful owners, and in default of any such appearing for the Crown, are strictly fiduciary and analogous to that of a trustee, and that as such he is at least entitled to the ordinary rights of a trustee in an administration suit. The second section of the Act 15 & 16 Vict. c. 3, expressly recognizes this fiduciary character, when it declares that the nominee of the Crown shall be subject to all the liabilities and duties imposed on an administrator. His position is different from that of the Attorney-General, the present not being a question as to paying or receiving costs, but of retainer under the head of just allowances; and it is to be observed that the present plaintiff only established her title in the suit in which the Crown interposed for her protection. With respect to the supposed rule that the Crown neither receives nor pays costs, it is declared by Lord COTTENHAM to be not without exception. *Attorney-General v. Corporation of London.* (a) The practice also, in all charity informations, is

(a) 2 M. & G. 247; see p. 273.

invariably to give the Attorney-General his costs, which do not partake of the character of costs to be received by one party against another. Before the Statute of Glo'ster (6 Edward 1, c. 1), Courts of justice had no power to award costs to either party, and the Crown not being named in that statute was of course excepted from its operation, and remained subject to the ordinary rule of common law.

* 569 * *Mr. Bacon* and *Mr. Selwyn*, for the plaintiff, in support of the Vice-Chancellor's order. — It is clear that the Crown has asserted a title by the exercise of its prerogative and for its own personal interests, and its nominee ought not to be in a better position than any other party whose title has been proved to be unlawful. This view is further illustrated by a reference to the title and recital of the Act 15 & 16 Vict. c. 3, which points only to such personal estates of intestates as the Crown by its prerogative is entitled to. The present is beyond all doubt an appeal for costs alone, and not within any of the exceptions indicated in *Chappell v. Purday*. (a) The Vice-Chancellor has exercised his discretion in the matter, and it is the uniform practice of the appellate Court not to question the propriety of the discretion so exercised as to costs.

They also cited and commented upon the following cases: *The Lord Advocate and Officers of State in Scotland v. Lord Dundas*; (b) *Smith v. The Earl of Stair*; (c) *The Mayor and Corporation of Gloster v. Wood*; (d) *Murphy v. Osborne*; (e) *Perkins v. Bradley*; (g) *Hobson v. Neale*. (h) They also referred to a case of *Turner v. Maule*, coram KNIGHT BRUCE, in 1849, not reported.

The Solicitor-General, in reply.

November 25.

THE LORD CHANCELLOR. — This case was heard only upon a short point as to the title of the Crown to costs; the facts are these: [his Lordship here briefly recapitulated the facts as above

(a) 2 Phil. 227.

(e) 9 Ir. Eq. 254.

(b) 9 Cl. & Fin. 178.

(g) 1 Hare, 219.

(c) 2 H. L. Cas. 807.

(h) 17 Beav. 178.

(d) 3 Hare, 181.

set forth, and proceeded:] In that state of things it was a
* matter of course, that Mary Kane, upon obtaining a revo- * 570
cation of the letters of administration from the nominee of
the Crown in favour of herself, as the next of kin, should have
transferred to her all the property which had been possessed by
Mr. Maule, or the defendant, as administrator on behalf of the
Crown; and for that purpose she filed the present claim. Now,
if, instead of money in the funds and cash, the property had con-
sisted of chattels, there is no doubt in the world that she might
have brought an action of trover to recover possession of those
chattels. The property, however, not being of that sort, but being
simply composed of money and stock, the obvious course of pro-
ceeding was to institute the present suit in this Court for an
account, and to have the property transferred to her by the nomi-
nee of the Crown. That suit, so instituted, was heard before
the Vice-Chancellor STUART in the early part of this year, and the
Vice-Chancellor then made not the usual decree for an account,
but a decree inquiring what the property was which had been pos-
sessed by Mr. Maule or Mr. Reynolds, and to take an account of it,
making all just allowances. Upon that, proceedings took place in
the Judge's chambers, and the chief clerk has certified in detail the
exact amount of what money had been possessed by Mr. Maule, or
for which Mr. Reynolds was then accountable, and no question was
raised as to the propriety of that certificate.

That being so, the cause was set down for further consideration,
and, putting aside for the moment the question of costs, there can
be no doubt that the account having been taken, the decree must
necessarily have been that Mr. Reynolds, as standing in the place
of Mr. Maule, should transfer the whole of the intestate's property
to Mary Kane, the lawful administratrix.

That decree was accordingly made, and, subject to the
* question raised about the costs, is evidently perfectly * 571
right. The Vice-Chancellor, however, refused to give to
the Crown any costs, and the Crown contends, or rather the solic-
itor for the affairs of the Treasury contends by his counsel, that
the decree was wrong in not giving to him costs under two heads;
first, the costs of this suit, and, secondly, the costs to which Mr.
Maule had been put in resisting the unfounded claim of James
Kane.

Now as to the right of the Crown to receive costs generally, a

great deal of discussion was had at the bar, but in my opinion that discussion was entirely irrelevant to the present purpose. Many questions may arise as to when the Crown is to be in no different situation from the subject in respect not of paying costs (for that, I believe, is never done, the Crown is never made to pay costs), but of receiving costs, for sometimes it is in a position to receive costs. The Crown personally is never made to pay costs; it may be that the relator in an information is made to pay costs, but as a general proposition the Crown never pays costs; and where it is suing on its own personal account it never receives costs.

There was some contention at the bar as to whether this was to be treated as a transaction for the personal behoof of the Crown. If it were necessary to decide that, the strong inclination of my opinion is that it is a matter for the personal interest of the Crown. It is not a case in which the Crown comes forward, as was said by the Solicitor-General, in a fiduciary character; the Crown comes forward and takes out administration, and, taking administration by its officer, the officer is in one sense in a fiduciary character; that is, the Crown is so far trusted with the funds as that it must apply the assets in paying the debts, if debts there are; but in reality the Crown takes out administration for its own benefit. Therefore if that were the *ground on which this question was to be decided, if the principle which was to regulate my decision was whether the Crown was personally interested in this matter or not, I should be clearly of opinion that it was a case in which the Crown was personally interested; but whether I am right or wrong in that view, I do not wish finally to conclude myself upon the point, because I am perfectly clear that in whatever character the Crown took out administration here, I cannot possibly give to it the costs of this suit; they are costs which if it were the case of a subject he possibly might have been made to pay, but never by possibility could have been entitled to receive. This is not a case in which an administrator having got possession of property, persons claiming under the administration sue for it. This is a case in which the nominee of the Crown having wrongfully got possession of an intestate's estate (I do not mean to use the word offensively, for in the first instance the administration was properly taken out, as it was supposed, though it turned out wrongfully), the rightful owner sues the representative of the Crown, and recovers it from

him. It might be a question whether, if the contention had been between subject and subject, in such a case I might not have compelled the defendant to pay costs; but I cannot conceive a case in which this Court would give the costs from the rightful owner to the wrongful owner in a suit in which the rightful owner established his title. It seems to me, therefore, that this question about the Crown's title does not arise here, that, whether Crown or subject, there can be no title to the costs of this suit.¹

Then the question arises as to the costs of the other suit, which was instituted by James Kane. I think it might have been reasonable that the costs of that suit should have been allowed to Mr. Reynolds under the direction to make to him all just allowances; but as that * has not been done, and as no excep- * 573 tion nor any proceeding in the nature of an exception was taken to the non-allowance of those costs, all I have to consider is what is the proper decree to make when the chief clerk has made his certificate as he has here, and when nothing remains to be done but to decide with reference to the costs of this suit. I have already said that I think the costs of this suit were very properly not given, and the direction to pay over to the plaintiff was the only direction that could be given. It was too late to raise the question about the costs of the other suit, it should have been raised if it could have been raised before the chief clerk, and I therefore entirely concur with the Vice-Chancellor in thinking that no costs ought to be given under one head or the other, and consequently that the appeal ought to be dismissed.

Mr. Bacon. — I cannot ask your Lordship to give costs against the Crown, but I can ask the Court to give me the deposit.

THE LORD CHANCELLOR. — I think that the deposit must be returned.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 12 and note; Attorney-General v. Corporation of London, 2 M'N. & G. 247, 269, 271, 272.

ARNOLD v. COAPE.

1854. December 14, 15, 16, 18. 1855. January 15. Before the Lord Chancellor Lord CRANWORTH.

A testator by his will devised all his real estate to A. B., his eldest son, for ninety-nine years, if he should so long live and subject thereto to trustees and their heirs during A. B.'s life, in trust only to support contingent remainders, with remainder to the heirs of the body of A. B., and for want of such issue to his second son in like terms. By a codicil, the testator, after confirming his will, devised his real estate to trustees upon certain trusts for the payment of debts and securing a jointure for his wife: *Held*, that the trustees were bound, after providing for the jointure and debts, to convey the estates to the same uses as those declared by the will; that the heirs of the body of A. B. took by purchase, and that no equitable freehold resulted to A. B., so as to attract the operation of the rule in *Shelley's Case*, and create an estate tail in A. B.¹

Seemle, the rule in *Shelley's Case* applies only where the remainder is created by the same instrument which creates the particular estate.

THIS was an appeal from the decision of the Vice-Chancellor STUART. The case is reported before his Honor in the second volume of Messrs. Smale and Giffard's Reports, page 311, from whence this statement is extracted.

¹ See the remarks upon this case in 2 Jarman Wills (3d Eng. ed.), 306, 310, 311, 313, 314; Lewin Trusts (5th Eng. ed.), 88 note (d), 97; 4 Kent (11th ed.), 214 *et seq.*; Stephenson v. Hagan, 15 B. Monr. 282. The rule in *Shelley's Case* is not applicable to a devise of an equitable estate for life to the ancestor, and a legal estate, after the termination of the life-estate, to the heirs. Ward v. Amory, 1 Curtis C. C. 419. See White v. Woodberry, 9 Pick. 136, 138. "The rule in *Shelley's Case* has been received and adopted in the United States, as part of the system of the Common Law." 4 Kent, 229; Dott v. Cunningham, 1 Bay, 453; Carr v. Porter, 1 M'Cord Ch. 60; Polk v. Farris, 9 Yerger, 209; Simpser v. Simpser, 15 Md. 160; Cooper v. Cooper, 6 R. I. 261; Payne v. Sale, 2 Dev. & Bat. Eq. 455; Kiser v. Kiser, 2 Jones Eq. 28; Hodges v. Little, 7 Jones (Law), 145; Horne v. Lyeth, 4 H. & John. 431; James's Claim, 1 Dallas, 47; King v. King, 12 Ohio, 390; Bishop v. Selleck, 5 Conn. 100; Brant v. Gelston, 2 John. Cas. 384; Richardson v. Wheatland, 7 Met. 169; Wood v. Williams, 13 Met. 486. This rule has been abolished as a rule of law in many of the States, for which see 1 Washb. Real Prop. Book II., Ch. IV., Sec. VIII. § 17, p. 274; Williamson v. Williamson, 18 B. Monr. 329; Hampton v. Rather, 30 Miss. 193; Chew's App. 37 Penn. St. 23, 4 Kent, 231 and notes.

George Arnold, of Ledgers Ashby, in the county of Northampton, by his will dated the 14th May, 1794, after making certain dispositions immaterial to the present question, devised as follows : —

“ And as to all the rest of my real estates situated within the county of Warwick and the county of the said city of Coventry or elsewhere within the kingdom of Great Britain which I have power by this my will to dispose of, I devise the same chargeable with any mortgage or mortgages which now do or hereafter may affect the same unto my eldest son, George Henry Arnold, for the term of ninety-nine years ; and in case he shall so long live, and subject to the said term, I devise the same unto Henry Hoare, of Mitcham, in the county of Surrey, Esquire, and Thomas Gilbert, of Collin, in the county of Derby, Esquire, and their heirs during the life of my son in trust only to support the contingent remainders hereinafter limited ; and after the determination of the said estates then I give * all the said hereditaments and premises * 575 subject as aforesaid unto the heirs of the body of my said son, G. H. Arnold ; and for want of such issue, I devise the same subject as aforesaid unto my second son, Edward Richard John Arnold, for the term of ninety-nine years, if he shall so long live, and subject to the said term, I devise the same unto the said H. Hoare and T. Gilbert, and their heirs during the life of my said son, E. R. J. Arnold, in trust only to support the contingent remainders thereinafter limited ; and, from and after the determination of the said estates, then I devise the same unto the heirs of the body of my said son, E. R. J. Arnold.”

The testator then in default of such issue devised the same to his wife if she remained unmarried ; and, in case of her death or marriage, as his eldest son should appoint ; and, in default of appointment by his eldest son, as his second son, and in default thereof as his wife should appoint. The testator also gave each of his sons power to jointure, and raise portions for the younger children not exceeding amounts specified in the will. There was an ultimate trust in favor of Edward Morrison and his heirs for ever.

By a codicil dated the 27th June, 1806, the testator devised to his wife, Henrietta Jane Arnold, Henry Peters, Henry Hoare, and Lieutenant-General Edward Morrison, all his “ freehold and copy-

hold estates situate in the parish of Ledgers Ashby, in the said county, &c., or elsewhere in the kingdom of Great Britain, to hold the same to the use of H. J. Arnold, H. Peters, H. Hoare, and E. Morrison, their heirs and assigns for ever, upon trust that they the said H. J. Arnold, H. Peters, H. Hoare, and E. Morrison, or the survivor of them, his or her heirs or assigns, do and shall with all convenient speed after my decease, by such conveyances as
 * 576 counsel shall advise, * convey and assure unto the trustees named in the articles made previously to my marriage, such part and so much of the said estate as they in their discretion and of their own proper authority shall think fit, and together with the provisions in the said articles mentioned or referred to, will make up the yearly rent-charge or sum of 1200*l.* as the jointure for my dear wife, Henrietta Jane, to be paid at the time and in manner in the said articles mentioned. And I hereby empower my said trustees to sell, convey, and exchange, or to mortgage all or any part of my said estates. And I declare that their receipts shall be sufficient discharges to purchasers and mortgagees, who shall not be bound to see to the application of the purchase or mortgage moneys. I hereby charge and make chargeable all and singular my said estates with the payment of my just debts, and particularly of all such sums of money as by the permission of John Caldecott, Esquire, I have received from all or any of my trust estates and which are unaccounted for by me to him. In witness, &c.”

The testator made a second will dated in 1806, which was inoperative as to the realty, and died in October, 1806, having had no children by his first wife, but leaving three sons by a second wife; G. H. Arnold, his eldest son and heir-at-law, E. R. J. Arnold and James William Arnold, his only other children.

G. H. Arnold died in October, 1844, leaving one daughter, Georgiana, who intermarried with William Coape, since deceased, and is the mother of the infant plaintiff. In 1836 he executed a disentailing deed, and subsequently devised the estates to the defendant.

The bill in the first suit was filed on the 10th November,
 * 577 * 1851, by Henry Fraser James Coape, the infant son of Georgiana, only child of G. H. Arnold, by James Coape, his father, as his next friend, claiming to be entitled to certain estates in the counties of Northampton and Warwick, of which George

Henry the testator died seised under the limitations contained in his will. The second suit was instituted on the 12th July, 1852, by the defendant in the original suit claiming to be entitled to the same estates by virtue of the disentailing assurance executed by G. H. Arnold, and also claiming an estate called the Mirrables in the Isle of Wight. To this cross-bill the plaintiff in the original suit demurred; and the demurrers were ordered to come on with the cause at the hearing.

The Vice-Chancellor having decided that the estate tail in remainder limited to the heirs of the body of George Henry Arnold did not coalesce with the previous limitation to him for the term of ninety-nine years so as to attract the rule in *Shelley's Case*, the defendant, the devisee of George Henry Arnold, now appealed to the Lord Chancellor.

Mr. Wigram, Mr. Rolt, and Mr. Toller, for the plaintiff in the first suit, and in support of the Vice-Chancellor's decision. — The construction contended for by the defendant will defeat the testator's intentions, as in the codicil he expressly confirms his will. The effect of the codicil is simply to give the estate to the trustees therein named, upon certain specific and partial trusts: as soon as those trusts were performed, the law cast upon the trustees the duty of conveying the estate to the uses of the will, which the testator has in all other respects confirmed by his codicil. The Court if now called upon to clothe those equitable limitations with the legal estate, the testator *having been "his * 578 own conveyancer," would do so (and that is the true criterion) in the very words of the will, giving an estate tail by purchase to the heirs of the body of George Henry Arnold. *Austen v. Taylor*; (a) *Harrison v. Naylor*. (b)

If, however, the codicil is not to be construed as implying a trust to convey to the uses of the will, yet the construction must be such as will give effect to every part of the instrument. The limitation to Hoare and Gilbert in the will is in terms "only to support the contingent remainders;" there is not the usual trust of the rents and profits for the beneficial taker. If, then, the codicil is so construed as to create a permanent trust in the trustees therein named, the limitation in the will to Hoare and Gilbert

(a) 1 Eden, 361.

(b) 2 Cox, 247.

would be vain and nugatory: *Hopkins v. Hopkins*; (a) for the devise to the trustees of the codicil gives them a legal estate which would of itself support all the contingent limitations; and it is clear that Hoare and Gilbert would not take any estate. *Nouaille v. Greenwood*. (b) If the contention of the defendant is to prevail, and G. H. Arnold to be regarded as having been equitable tenant for life, there must have been a merger, because the codicil having made all the estates of the will equitable, the term would necessarily have merged.

Moreover, the construction contended for by the defendant would be very capricious in its effects, for it would make George Henry Arnold tenant in tail, but E. R. J. Arnold (not being the heir-at-law) tenant for ninety-nine years only. Such a construction also is in its nature wholly *ex post facto*, as it depends upon the accidental and subsequent circumstance of George Henry Arnold being at the testator's death his heir-at-law.

* 579 * With respect to the application here of the rule in *Shelley's Case*, we submit, first, that even admitting that the rule applies equally to equitable as to legal limitations, it would nevertheless be inapplicable to the present case, inasmuch as the limitations, if legal, would not have created an estate tail in the first taker.

Secondly, the rule applies only where, by the instrument creating the limitations, an estate of freehold is expressly or by implication under the instrument limited to the ancestor, and the limitation to the heirs, or to the heirs of the body, is limited as a remainder properly so called expectant on the determination of the particular estate supporting it. In the present case, however, no particular estate of freehold is limited to G. H. Arnold, either expressly or by implication under the instrument; but, on the contrary, the intention to give him any such estate is excluded by the express estate for years which is limited to him. The rule has therefore no application, and the limitation to the heirs of the body of G. H. Arnold and all the future uses take effect by way of shifting use or executory devise. No authority can be cited in which this Court has implied a previous estate of freehold against the intention of the author of the settlement. It is true that the

(a) 1 Atk. 586.

(b) 1 Turn. & R. 26.

defect was supplied in the cases of *Pibus v. Milford* (a) and *Penhay v. Hurrell*; (b) but professedly in support of what the Court believed to have been the intention. In *Adams v. Savage*, (c) *Rowley v. Holland*, (d) and *Tippin v. Cosin*, (e) the Court refused to imply a preceding life-estate, inasmuch as there was an express estate for the term of ninety-nine years limited to the grantor, which would have been incompatible with an *estate arising * 580 by implication. Mr. Fearne, treating of the rule in *Shelley's Case*, under the heading of "Exception from the Fourth Class of Contingent Remainders," Fearne's Cont. Rem., pp. 28, 71, 76, 505, in reference to the foundation of the requisition, that the limitations of the two estates should be in the same instrument, says, "if there be a limitation to a man's heirs in any deed or instrument, and afterwards he acquires the freehold, &c., by other conveyance or instrument, in this case the two estates will not become united in him," p. 71.

They referred, also, to the following cases and authorities: *Gore v. Gore*; (g) *Doe d. Harris v. Howell*; (h) *Rochford v. Fitzmaurice*, (i) and Hayes's Principles for Expounding Dispositions, &c., p. 63, note (g); Sugd. Gilb. Uses, p. 35.

Mr. Malins, Mr. Rogers, and Mr. W. R. A. Boyle, for the defendant in the first suit. — We submit that, whether regarded as heir-at-law or not, George Henry Arnold took an estate of freehold which coalesced with the limitation to the heirs of his body. Under the will considered alone, George Henry Arnold had, besides his legal estate for ninety-nine years if he should so long live, an equitable estate for the rest of his life, by necessary implication from the instrument itself. *Pibus v. Milford*; (a) *Penhay v. Hurrell*. (b) For, although the usual words, "in trust for him," are omitted in the limitation to the trustees to support contingent remainders, the Court would have come to the conclusion, that the estate was held in trust for him: *Wills v. Palmer*; (k) the instrument to be construed being a will, and it being plain that the

(a) 1 Vent. 372.

(b) 2 Vern. 370.

(c) 2 Salk. 679.

(d) 22 Vin. Abr. tit. Uses. (F.) pl. 11.

(e) Carth. 272.

(g) 2 P. Wms. 28.

(h) 10 B. & C. 191.

(i) 1 Con. & Law. 158.

(k) 5 Burr. 2615.

* 581 trustees do not *themselves take any beneficial interest.

Then the codicil introduces a legal estate in fee-simple in the trustees therein named, and thereby all the subsequent estates are rendered equitable, — every obstacle to the coalescing of the two estates is removed, and George Henry Arnold became equitable tenant in tail in possession. The devise to the trustees to support contingent remainders is revoked by the codicil. They would have taken merely a dry legal estate under the will; but that is entirely taken out of them by the codicil; under which, to adopt Lord HARDWICKE'S language in *Hopkins v. Hopkins*, "the trust estate remains in the trustees to serve and support all the trusts." (a) Even assuming the decision in *Tippin v. Cosin*, (b) *Adams v. Savage*, (c) *Rawley v. Holland*, (d) to be unquestioned, still they cannot be used as authorities in the present instance, for in those cases the question arose upon deeds, while this arises upon a will under which the estate must result to the heir-at-law; and there can be no implication to the contrary, for the same principles apply to resulting trusts as to resulting uses, and any part of the beneficial interest not disposed of results to the heir-at-law. Sanders's Uses and Trusts, p. 358.

The limitation to the heirs of the body ought not to be construed as an executory devise, as the plaintiff suggests, the rule being that a future interest capable of taking effect as a contingent remainder shall never take effect as an executory devise.

We deny that in order to attract the rule in *Shelley's*
 * 582 * *Case* the limitation to the heirs or to the heirs of the body must be a remainder properly so called. The consequence which, as it is argued on the other side, follows from our position, namely, that, if under the limitations G. H. Arnold takes an estate tail, and he had died in the testator's lifetime leaving issue, the estate tail would have lapsed, is not an objection to our argument. Neither does the doctrine of merger create a difficulty against us, as it does not apply to equitable estates. *Hodgson v. Ambrose*. (e) The Vice-Chancellor was in error in supposing that there was any objection whatever to the co-existence of two equitable estates in G. H. Arnold.

(a) 1 Atk. 581; see p. 592.

(c) 2 Salk. 679.

(b) Carth. 272.

(d) Vin. Abr., Tit. Uses (F.), pl. 11, and 2 Eq. Ca. Abr. 753.

(e) Dougl. 337.

They also referred to the following cases and authorities: *Hayes v. Foorde*, (a) *Bagshaw v. Spencer*, (b) *Wright v. Pearson*, (c) *Elsie v. Osborn*, (d) *Garth v. Baldwin*, (e) *Perrin v. Blake*, (g) *Coulson v. Coulson*, (h) *Austen v. Taylor*, (i) *Jones v. Morgan*, (k) *Jervoise v. Duke of Northumberland*, (l) *Doe dem. Cooper v. Finch*, (m) *Carrick v. Errington*, (n) *Tregonwell v. Sydenham*, (o) *Jones v. Mitchell*, (p) *Gibbs v. Rumsey*, (q) *Watson v. Hayes*, (r) *Stonehouse v. Evelyn*, (s) *Levet v. Needham*, (t) *Sherrard v. Lord Harborough*, (u) *Doe dem. Bosnall v. Harvey*, (v) *Thong v. Bedford*, (w) * *Bale v. Coleman*, (x) * 583 *Brydges v. Brydges*, (y) *Fearne's Cont. Rem.* pp. 40, 43, 49, *Cruise's Digest*, ed. by White, Vol. VI. pp. 279, 284.

On the subject of the direction to the trustees of the codicil to convey to the uses of the will, they referred to *Egerton v. Brownlow*, (z) and on the question of the costs of the suit, *Thomason v. Moses*, (aa) and *East v. Twyford*. (bb)

Mr Wigram, in reply. — The rule in *Shelley's Case* arises out of the doctrine of tenures, and existed long before executory devises or springing uses, and the statement of the rule by the Court in *Shelley's Case* (cc) shows that it applies to remainders only, and *Mr. Fearne's* remarks on the case of *Loyd v. Carew* (dd) corroborate that position: *Fearne's Cont. Rem.* p. 276, and to the same effect is 2 Rolle's Ab. p. 417, pl. 5.

The case of *Venables v. Morris* (ee) shows that the Court will

(a) 2 W. Bl. 698.

(b) 1 Ves. Sen. 142; S. C., 2 Atk. 246, 570, 577.

(c) Amb. 358. (d) 1 P. Wms. 387. (e) 2 Ves. Sen. 646.

(g) 4 Burr. 2579; S. C., 1 W. Bla. 672.

(h) 2 Stra. 1125.

(t) 2 Vern. 138.

(i) Ambl. 376.

(u) Ambl. 165.

(k) 1 B. C. C. 206.

(v) 4 B. & C. 610.

(l) 1 J. & W. 559; see p. 572.

(w) 1 B. C. C. 313.

(m) 4 B. & Ad. 283.

(x) 1 P. Wms. 142.

(n) 2 P. Wms. 361.

(y) 3 Ves. 120.

(o) 3 Dow, 194.

(z) 4 H. L. Cas. 1.

(p) 1 S. & S. 290.

(aa) 5 Beav. 77.

(q) 2 Ves. & B. 294.

(bb) 4 H. L. Cas. 517.

(r) 5 Myl. & Cr. 125.

(cc) 1 Rep. 227; see p. 256.

(s) 3 P. Wms. 252.

(dd) Prec. in Chanc. 72, 106; Show's Parl. Ca. 137.

(ee) 7 Term Rep. 342, 348.

not tamper with the limitation to trustees to preserve contingent remainders. In *Pibus v. Mitford*, (a) and other cases of the same class, the Court has discerned a sufficient indication of an intention to raise an estate by implication; but it must be observed that an use resulting by implication of law is wholly different from an use resulting by implication of intention, which can never arise where there is an express gift.

1855. January 15.

* 584 * THE LORD CHANCELLOR. — The question in this case arises on the will and codicil of George Arnold. [His Lordship here read the limitations as above set forth and proceeded:] The testator died on the 23d October, 1806, leaving George Henry his eldest son and heir. George Henry enjoyed the estates till his death in 1844, when he died, leaving Mrs. Coape his only child and heiress of his body. She died in 1849, leaving the plaintiff her only son. In 1836, George Henry executed a disentailing deed under which the defendant derived title, and his title is good if George Henry was tenant in tail. If he was not tenant in tail, then on his death Mrs. Coape became entitled as a purchaser under the limitation to the heirs of his body, and the plaintiff is now entitled.

The cause was heard by Vice-Chancellor STUART, who decided in favour of the plaintiff. From his decree the defendant has appealed, and the cause was heard at considerable length before me during the sittings after last term.

There is no question as to what would have been the rights of the parties if there had been no codicil. George Henry would have been tenant for ninety-nine years if he should so long live, with remainder to trustees and their heirs during his life, and at his death his only child, Mrs. Coape, would have taken as tenant in tail under the contingent remainder to the heirs of the body of George Henry. The disentailing deed of 1836 would not have affected that remainder at all.

But the defendant contends that the rights under the will were materially modified by the operation of the codicil; for the testator thereby vested the whole legal fee in trustees, so that the
* 585 estates given by the will ceased * to be legal and became mere equitable interests. And reading the will and codicil

(a) 1 Vent. 372.

together as one instrument, the defendant contends that their joint effect was to make George Henry equitable tenant for life, with an equitable remainder to the heirs of his body.

This would certainly, if the estates were legal interests, make the devisee tenant in tail. Equity, it was argued, follows the law, and so George Henry became equitable tenant in tail. The plaintiff, on the other hand, contended either that the codicil must be read as imposing on the trustees an implied obligation (after satisfying the trust for raising money) to convey to the uses of the will, and so making the trust an executory trust; or if not, still that the rule in *Shelley's Case* would not apply, inasmuch as the limitations, if legal, would not have created an estate tail in the first taker.

Being of opinion that the plaintiff is right in this latter proposition, I do not feel called on to consider a great deal of the very elaborate argument which was addressed to me at the bar. In a certain sense, and to some extent, all trusts are executory; i.e., in all trusts the legal interest is in some person who is bound in conscience, and so is compellable by this Court, to employ that legal interest for the benefit of others. To this extent his duties are executory. Where the subject-matter of the trust is a real estate held by a trustee for the benefit of others, and the trustee has no active duties to perform, such as paying debts, raising portions, or the like, the same rules which would have decided the rights of parties, if the beneficial interest had been legal, will, in general, prevail in deciding for whose benefit the trustee is to hold the estate. The rule is, equity follows the law, a rule essential to the convenient enjoyment of property in this country, where the artificial distinction of legal and *equitable estates so *586 extensively prevails. Indeed, neither party here contested the existence of the rule; the question is, how is it to be applied in this particular case?

My opinion is clear that the trustees named in the codicil were bound, after providing for the jointure of the testator's wife and his debts, to convey to the same uses exactly as those mentioned in the will; i.e., to George Henry for ninety-nine years, if he should so long live, with remainder to the trustees of the will and their heirs during the life of George Henry, with remainder to the use of the heirs of his body; and, until any such conveyance should be made, they were bound to hold on corresponding trusts.

I do not come to this conclusion on any distinction between trusts executed and executory, on there being or not being an express direction to convey. In the cases in which questions have arisen on such distinction, the contest has been whether the trustee ought not to be compelled to convey in some manner not strictly in accordance with the letter of the will or instrument creating the trust; whether from the terms of the will or instrument, or from the obvious intention of its makers, it is not apparent that something was intended different from that which would result from a literal compliance with its language. There is no such question here.

I treat the trust as being not executory in the sense in which that word is used in the cases to which I have alluded. And then it must be treated as a trust in which the duty of the trustees is to permit the estate to be held from time to time by the very persons who, according to the precise terms of the will, would have been entitled to it in case no codicil had been made, and this clearly

* 587 gave the beneficial interest, after the death of George Henry Arnold, to his only child, Mrs. Coape, as tenant in tail by purchase, under whom the plaintiff derives title. Any other construction would, in effect, defeat the rule "Equity follows the law," at the very time it professed to be founded on it. This is apparent from considering how the case would stand if a testator, having a legal fee in some lands and an equitable fee in others, were to devise both together in language the same as that now before me. That the first taker would not be tenant in tail of the first-mentioned lands is certain. Surely it is a strange perversion both of language and of principle to say that he would be tenant in tail of the others because the equitable is to follow the legal construction. So again, if a testator after devising, in the precise words used in this will, lands of which he was seised in fee, should mortgage a part for years and other part in fee, it is a strange proposition that the will should operate differently on the equity of redemption of the one and of the other.

The argument of the defendant must go the length of contending that, though the owner of the legal fee may certainly, by means of a term of years and a limitation to trustees to preserve contingent remainders, give the beneficial interest for life to the first taker, and at his death to the heirs of his body as purchasers, yet that he cannot by any means accomplish this if he has only the equitable

fee; a proposition fraught, as it seems to me, with serious mischief, considering how often it may happen that there is some outstanding legal term unnoticed by the testator or his advisers, the consequence of which, if the arguments of the defendant were to prevail, would be to give to the will an effect totally different from what was intended.

Instances might be further given of similar anomalies, but I do not think it necessary to multiply them. The *short *588 ground on which my decision rests is, that the only effect of the codicil was to transfer the legal estate to the trustees, upon trust, after making due provision for the jointure and debts, to put the estate in precisely the same course of enjoyment as that in which it would have gone if no codicil had been made, and this certainly did not give to G. H. Arnold an estate which enabled him to defeat the remainder limited to the heirs of his body.

I must not be understood as at all impugning or questioning the doctrine that the rule in *Shelley's Case* does not depend upon, and cannot be controlled by, the intention of the testator or settlor; if the estates created are such as to bring the rule into operation, the rule will prevail even against a declared intention to the contrary. But where the question is, what estates, on the true construction of a will, were meant to be created,—did the testator mean to create an estate of freehold or only an estate for years?—there intention may and must be regarded; and here, looking to the intention of this testator, I cannot doubt but that he meant to give to the first taker an estate for years only, with the express object of avoiding the operation of the rule. In such a case it is, I think, the duty of the Court to give effect to the intention.

The view which I have thus taken excludes from consideration nearly all the questions very ably discussed by the defendant's counsel. It was strongly and elaborately argued that G. H. Arnold took under the will an equitable estate for life expectant on the ninety-nine years' term, either by implication under the will or by way of resulting trust as an interest undisposed of. In either case it was said that life-interest was such as would make the rule in *Shelley's Case* applicable. If it was an estate under the will by implication, the cases of *Pibus* *v. *Mitford* (a) and *589 *Penhay* v. *Hurrell* (b) were relied on; if it was a mere re-

(a) 1 Vent. 372.

(b) 2 Vern. 370.

sulting trust, then *Wills v. Palmer* (a) was said to be an authority in point; and other cases cited and commented on by *Mr. Fearne* were also relied on. Again, it was argued that whether the limitation to the heirs of the body was to be treated as a contingent remainder or as an executory devise, still the rule in *Shelley's Case* would be applicable, and the opinions of *Mr. Fearne* and *Mr. Hayes* to the contrary were questioned.

I do not feel myself called on to express any decided opinion (extra-judicial as it would necessarily be) on these points; not, as I think, properly arising in the case. But certainly my understanding of the rule has always been that it applied only to the case of remainders created by the same instrument which creates the particular estate of freehold. I repeat, however, that this question does not arise in the case now before me for decision, and I desire not to be considered as binding myself on the subject. It is sufficient to say that I entirely concur with the Vice-Chancellor in holding that, on the true construction of the will and first codicil, taken together, G. H. Arnold took an estate for ninety-nine years only determinable on his death; and that, on his decease in 1844, his daughter became, and that the plaintiff as her eldest son now is, entitled to the freehold estates devised by the will and codicil as tenant in tail, and so that the decree in the original suit dismissing the bill was right.

A point was made that the decree ought to have directed an inquiry as to the copyhold estates, with a view of distinguishing them. But the answer given at the bar was satisfactory,
 * 590 namely, that the bill sets up no title * whatever in respect of the copyholds; and there is no suggestion that they are intermixed, or that there will be any difficulty in obeying the decree by giving up possession of the freeholds.

With respect to the cross-suit it was said that the plaintiff there must be entitled to some relief; for that, so far at all events as relates to the copyholds, his title is clear; and so that he is entitled to a conveyance from the infant plaintiff, who, it seems, is the heir-at-law of the surviving trustee named in the codicil. But I cannot concur in this suggestion, which is obviously a mere afterthought set up in the hope of saving some of the costs. Part of the case made by the cross-bill is, that the unattested will was

(a) 5 Burr. 2615.

a valid disposition of all the testator's copyhold estates, operating as a revocation of the prior will and codicil, and so defeating altogether the legal interest of the trustees named in the codicil. The plain object of the cross-bill, apparent from all its statements and charges, and from the prayer, was to establish a title under G. H. Arnold as tenant in tail to all the property devised by the first will and codicil. In this the plaintiff has wholly failed, and his bill was therefore properly dismissed with costs. I think indeed that the decree is wrong (by what was evidently a mere oversight) in confining the dismissal to so much as related to the freeholds. The plaintiff in the cross-suit has established no title to any relief whatever, either as to freeholds or copyholds; and I shall therefore strike out the words restricting the dismissal to so much of the bill as sought relief as to the freeholds. The cross-bill must be dismissed generally with costs. This is a very unimportant alteration, and certainly not one to which the appeal was directed; and I therefore must dismiss the appeal with costs.

* ATTORNEY-GENERAL v. CLAPHAM.¹ * 591

1854. November 21, 22, 23, 25. December 1, 2, 8, 9. 1855. January 15.
Before the Lord Chancellor Lord CRANWORTH.

Where a fund is raised for a charitable purpose, like that of founding a chapel, and the contributors are so numerous as to preclude the possibility of their all concurring in any instrument declaring the trusts, and such a declaration of trust is made by the persons in whom the property is vested at or about the time when the sums have been raised, that declaration may reasonably be taken *prima facie* as a true exposition of the minds of the contributors.

Parol evidence is admissible to enable the Court rightly to understand in what sense words are used in a deed, just as evidence is afforded by a dictionary which enables us to translate a foreign language, or by a book of science, which gives us the meaning of words of art; but where the aid of parol evidence is invoked for the purpose of contradicting the express provisions of a deed, then such evidence is inadmissible.

In the year 1751 some members of the Methodist body, followers of John Wesley, purchased a chapel, which was duly conveyed to trustees, upon trust that the appointment of the preachers thereof should be made by John

¹ S. C., 1 Jur. N. S. 505; 24 L. J. Ch. 177.

Wesley, during his life, and, after his death, by the trustees. Upon an information in 1853, filed at the relation of two members of the body of Wesleyan Methodists, for the purpose of establishing the right in the Conference of appointing preachers to the chapel, and of removing those of the trustees who asserted the right of appointment in opposition to the Conference: *Held*, that parol evidence was inadmissible to prove that the provision in the deed giving the appointment of the preachers to the trustees, was inconsistent with the paramount objects of its founders, and would, after the death of John Wesley, clash with the general system of Methodism.¹

The expression attributed to the Lord Chancellor in *Attorney-General v. Hardy*, 1 Sim. N. S. 338, with respect to the removal of dissentient trustees, observed upon.

- THE information in this suit was filed at the relation of Thomas Beaumont and James Middlebrook, two members of the society of
- Wesleyan Methodists at Birstal in Yorkshire. It stated that the religious body known by that appellation was begun to be formed by John Wesley in 1739. That his plan was to unite the “members” into “societies,” meeting in particular localities; to appoint “ministers or preachers” in the societies, the senior being called the “assistant preacher or minister,” and “stewards” for the temporal concerns of the societies. That the “societies” were subdivided into small companies called “classes,” the members of which were charged to promote each other’s religious edification, and one of them was called the “class-leader.” That when the societies in particular neighbourhoods were sufficiently numerous, they were divided into “circuits,” comprising the societies contiguous or conveniently accessible from each other. That “ministers or preachers” were afterwards appointed to particular circuits, who, by the direction of the “senior or assistant preacher or minister,” itinerated from place to place within the circuit as occasion might require. That the government and direction of the entire body was originally vested in John Wesley exclusively, and that he appointed the ministers or preachers in the societies or circuits.

The information then stated that in 1744 John Wesley commenced the practice of summoning certain of the ministers and preachers to meet him in conference and assist him with their advice in the exercise of his jurisdiction: that these assemblies became annual, and were called “The yearly Conference of the

¹ See *Attorney-General v. Murdock*, 1 De G., M. & G. 86 and notes; *The Dublin Case*, 38 N. H. 459.

people called Methodists," and that after its organization John Wesley was accustomed to act in the exercise of his jurisdiction in accordance with the opinion of the majority so assembled; and that this was the system of the Methodists in operation in 1750.

The information then stated that in or before 1750 John Wesley, with the assistance of his brother Charles Wesley and William Grimshaw, formed a society at Birstal in the West Riding, which was united with certain neighbouring societies into the "Birstal circuit;" and that in August, 1751, John Wesley, with the concurrence of the Conference, appointed John Nelson to be the preacher of the Birstal circuit. That in or before that year the society at Birstal bought a close of land there upon which they built a tenement and offices, part of which they appropriated as a meeting-house and the other part as a residence for their ministers or preachers; and that the purchase-money and fund for building was provided partly by the voluntary subscriptions of the * members of the society and others, and partly by * 593 money borrowed at interest upon the personal security of the persons to whom the property was conveyed as trustees.

The information then stated the conveyance by indenture of bargain and sale dated the 3d of December, 1751, of the premises described as the "New Meeting House" and appurtenances, then in the tenure or occupation of John Nelson, to John Rhôdes and eighteen other persons, upon trust to permit and suffer John Wesley, and such other person and persons as he should for that purpose from time to time nominate and appoint, at all times during his life at his will and pleasure, to have and enjoy the free use and benefit of the said premises,—that he John Wesley, and such person or persons as he should so appoint, might therein preach and expound God's holy Word; and from and after his decease, upon similar trusts to Charles Wesley and his appointees, during his life; and from and after his decease, upon similar trusts to William Grimshaw and his appointees, during his life; and from and after the decease of the survivor of them John Wesley, Charles Wesley, and William Grimshaw, then upon trust, that the parties of the second part (the nineteen trustees to whom the property was thereby conveyed), or the major part of them, or the survivors and survivor of them, and the major part of the trustees of the said house and premises for the time being, should at all times thereafter, monthly or oftener, at their discretion

nominate and appoint one or more fit person or persons to preach and expound God's holy Word in the said house, in the same manner as near as might be as God's holy Word was then preached and expounded therein: and upon further trust, that when and as often as any of the said trustees for the time being should happen to die, or other than the said trustees already appointed, should
 * 594 remove their or his place or places of * abode or residence for the space of twelve miles or more from the said house, or should resign or give up his or their place or places, station or stations of such trustee or trustees, that then and so often, so soon afterwards as conveniently might be, the rest of the trustees for the time being should elect and choose some other fit person or persons to be trustee or trustees to fill up such vacancies and keep up the number of nineteen trustees: and that when and so often as the number of the trustees in whom the legal estate in the said house and premises for the time being should be vested should be reduced to the number of five or less, that then and so often as soon as conveniently might be after the whole number of the trustees should be filled up and made nineteen, the trustee or trustees in whom the legal estate should be, should convey and assure the said house and premises to the use of themselves or himself and the rest of the said trustees for the time being and all their heirs for ever, upon the same trusts, and for the like purposes, as were thereinbefore declared, and so from time to time for ever thereafter, as often as the said trustees should be reduced to the number of five or any less number, whereby the said trusts might have a perpetual duration and continuance, and might not come to and vest in the heirs of any surviving trustee; provided always, and it was thereby declared, that every such preacher or minister from time to time appointed as aforesaid, so long as he should continue in his said office, should preach or expound twice every Sunday, Christmas Day, New Year's Day, and Good Friday; to wit, in the morning and again in the evening, and once every Thursday in the evening, in or at the place aforesaid, as had been usual and customary to be done.

The information then stated the death of nine of the trustees named in the deed of 1751,—the erection on * the
 * 595 trust estate by means of subscriptions of a cottage used by the stewards, class-leaders, and other members of the society as occasion required; and a conveyance dated the 7th May, 1782,

made by the surviving trustees of the first part, John Wesley and Charles Wesley of the second part, and nine other persons of the third part, whereby the parties of the first and second parts conveyed the premises to the parties of the third part, to the use of the parties of the first and third parts; and that a declaration of trust dated the 8th of May, 1782, was made between the same parties, whereby, after reciting the fact and object of the original purchase, — the conveyances of 1751 and 1782, — that by reason of the increase of members and hearers the said preaching-house had become insufficient, and that the members of the society, as well as the parties to this declaration, had agreed to rebuild and enlarge it, and that over and above the spontaneous contributions, 350*l.* would be wanted to defray the expense, and which the parties had agreed to advance upon the credit of the rents and profits to arise from the pews and seats, — it was declared that the premises were limited to the parties of the first and third parts, as concerning the messuage or tenement with the stable, hayloft, shed, yard, garden, croft, and other conveniences then in the occupation of John Shaw, upon trust that the trustees and the survivors of them, and the trustees for the time being, to be appointed in manner thereafter mentioned, should permit the said John Wesley, and such other persons as he should from time to time appoint during his natural life, to have and enjoy the free use and benefit of the said premises, — that the said John Wesley and such other persons as he should appoint might therein preach and expound God's holy Word; subject, nevertheless, to the declaration or agreement therein inserted concerning the receipt and application of the rents and profits to arise from the pews or

* seats in the preaching-house so to be rebuilt and enlarged * 596

as aforesaid; and after his decease, upon trust, that the trustees for the time being should permit the said Charles Wesley, and such persons as he should from time to time appoint during his life, to have and enjoy the said premises for the purposes aforesaid; subject, nevertheless, to such declaration or agreement concerning the pews or seats as aforesaid; and, from and immediately after the decease of the survivor of them the said John Wesley and Charles Wesley, upon trust that the trustees for the time being should from time to time, and at all times for ever thereafter, permit and suffer the said premises to be held and enjoyed for the purposes aforesaid, by such persons as should successively be chosen

and appointed to preach in the said house by the trustees of the premises for the time being ; and such members of the said society as had been class-leaders for three years at least within any of the circumjacent villages of Birstal, Great Gomersal, Little Gomersal, Birkenshaw, Adwalton, Drighlington, Batley, Carlinghow, and Heckmondwike, or the major part of such trustees and class-leaders. And it was thereby provided that the said persons should preach no other doctrine than was contained in Mr. Wesley's Notes upon the Old and New Testament ; and also that they should preach in the said house twice every Sunday, and at least one evening in every week ; and also that from and after the decease of the survivor of them the said John Wesley and Charles Wesley, every person who should be so appointed to preach in the said house should hold and enjoy the said premises and exercise the function or office of a preacher or pastor there, only during the good-will and pleasure of the major part of such trustees and class-leaders as aforesaid ; and that it should be lawful for the major part of such trustees and class-leaders to deprive, remove,

or suspend the preachers or pastors of the said society
 * 597 * for the time being, at their free will and pleasure, and to substitute and appoint other preachers or pastors, in the place of him or them so deprived, removed, or suspended. And as concerning the said then lately erected house or cottage with the appurtenances then in the occupation of John Hey, upon trust that the said trustees and the survivor of them, and the trustees for the time being, should from time to time and at all times thereafter permit and suffer such persons as the stewards of the said society for the time being should appoint to serve and attend the preachers or pastors of the said society, and no other persons to have and enjoy the ground rooms of or belonging to the said house or cottage. And as concerning the chamber of or belonging to the said house or cottage upon trust that the said trustees and the survivor of them, and the trustees for the time being, should from time to time and at all times thereafter permit and suffer the stewards, class-leaders, and other members of the said society to have and enjoy the free use and benefit thereof, to the intent that such stewards might therein transact the business and concerns of or relating to the said society, and that such class-leaders might therein meet their respective classes for religious conference and instruction, and that the members of the said society might there

sit and remain during the intervals of preaching on the Lord's day or other days. And it was thereby further declared that all and every the said tenements and premises were by the thereinbefore recited indenture limited in use to the trustees therein named and their heirs upon this further trust, that they and the survivors of them and the trustees for the time being should, from time to time and at all times from and after the rebuilding and finishing of the said preaching-house, permit and suffer the stewards of the said society for the time being to let or demise from year to year and no longer all and every the pews and seats therein for such yearly rents as * to them the said stewards * 598 for the time being should appear to be reasonable, and to receive, apply, and dispose of the same rents in such manner and for such intents and purposes as thereafter was mentioned; that was to say, in the first place, in repairing and supporting the said premises and all the buildings thereon erected or to be erected, and in the discharge of all taxes and rates which should be imposed on the same premises or any part thereof. And in the next place, in payment to the said persons who had agreed to advance the said sum of 350*l.*, the amount so advanced as therein mentioned. And in the next place, the said stewards for the time being should pay and allow for and towards the maintenance and support of the preachers or pastors of the said society for the time being such an annual sum, not exceeding 10*l.* a year, as should appear to the major part of the said persons who had so as aforesaid agreed to expend the said sum of 350*l.*, or of the survivors of them, to be reasonable and necessary; and after such payments as thereinbefore mentioned should respectively have been made, then the stewards of the said society for the time being should yearly and every year pay all the rest and residue of the rents and profits which should arise from such pews and seats unto the said beforementioned persons for and towards the repayment of the principal moneys by them advanced and expended in or about the said work; all the said payments to be made ratably and in proportion to the several sums so advanced by them respectively. And after such principal moneys with interest should be fully satisfied and repaid, then the stewards of the said society for the time being should from time to time and at all times yearly and every year pay and apply all the clear rents and profits to arise from the said pews and seats, after deducting for repairs and lasting improve-

ments of the said premises, and all other just and necessary repairs for and towards the maintenance and support of

* 599 * the preachers or pastors for the time being of the said society. And it was thereby further declared and agreed that from time to time and at all times after the decease of the survivor of them the said John Wesley and Charles Wesley, the stewards of the said society should be appointed and displaced by the preachers of the said society, and the trustees of the said premises for the time being, and such class-leaders as aforesaid, or the major part of such preachers, trustees, and class-leaders. And for the more regular appointing, displacing, suspending, or continuing of the preachers and stewards of the said society, in all times coming from and after the decease of the survivor of them the said John Wesley and Charles Wesley, it was thereby further declared and agreed that public notice should be given of the time of holding every meeting, for the purposes aforesaid, at or in the said preaching-house on three successive Sundays, immediately after evening service there, and the same should not be held until three days after such notice given, nor at any other place than the said preaching-house. And it was thereby further declared that all and every the said tenements and premises were, in and by the said last recited indenture, limited in use to the trustees therein named and their heirs, upon further trust that when and so soon as the said trustees should by death be reduced to the number of seven, then such seven surviving trustees should within three months next after such vacancy convey and assure the said tenements and premises with the appurtenances unto twelve other persons (whom they the said surviving trustees and such class-leaders as aforesaid, or the major part of them, should in that behalf appoint) their heirs and assigns to the use of such surviving trustees, and such other new trustees to be appointed as aforesaid, and of their heirs and assigns for ever, upon the trusts and for the intents and purposes thereinbefore mentioned and

* 600 expressed concerning the same premises respectively * and so from time to time and as often as the then present or any succeeding trustees should by death be reduced to the number of seven.

The information then stated conveyances of the 5th of December, 1809, and of the 12th of August, 1812, to trustees named Crowther and Street, of a tenement and two parcels of ground

adjacent to the meeting-house, which were purchased by the society at Birstal, for purposes corresponding with or auxiliary to those of the original foundation, and that the premises comprised in the conveyance of December, 1809, were occupied by one of the preachers or ministers of the society for the time being with the consent of the trustees as a residence. And that the premises comprised in the conveyance of 1812, except so much as formed the site of a school-house which was afterwards erected thereon, was occupied in like manner and with like consent for residential purposes.

The information then stated two indentures of bargain and sale dated the 22d of January, 1818, whereby the premises comprised in the indentures of 1751, 1782, 1809, and 1812, respectively, were expressed to be conveyed to seventeen persons as new trustees, and also a further conveyance dated the 7th of September, 1835, describing such part of the same premises as was comprised in the deeds of 1751 and 1782, as being now in the occupation of the Reverend H. Beech and J. Stocks, and such other part as was comprised in the deeds of 1809 and 1812, as now being in the occupation of the Reverend J. Mortimer, and whereby the whole premises were expressed to be conveyed by the survivors of the trustees named in the conveyance of 1818, to the use of some of such survivors and of other persons to the number of nineteen in the whole, and that by deed dated *the 8th of Sep- * 601
tember, 1835, such nineteen persons and the others of the surviving parties to the preceding deeds declared the trusts to be, as to the premises mentioned to be in the several occupations of the Reverend H. Beech and J. Stocks, upon the trusts expressed in the deed of 1782, and as to the premises mentioned to be in the occupation of the Reverend J. Mortimer upon trust at all times thereafter to permit and suffer the same to be for the habitation, use, or residence of the assistant minister or preacher who should for the time being be regularly and fairly chosen and appointed to preach and officiate in the said meeting-house by the trustees of the premises for the time being, and such members of the said society called Methodists as had been class-leaders for three years at least within any of the circumjacent villages therein mentioned, or the major part of such trustees and class-leaders. And as to the said school-house, upon trust at all times thereafter to permit and suffer the same to be used, occupied, and enjoyed for the pur-

pose of teaching and instructing therein on the sabbath days the children of the members of the said society in and near Birstal as aforesaid, and such other children as should from time to time be selected for that purpose by the trustees for the time being, and such class-leaders as aforesaid, or the major part of such trustees and class-leaders, by such teachers and masters as should from time to time be nominated and appointed for the purpose aforesaid by the trustees for the time being, and such class-leaders as aforesaid or the major part of such trustees and class-leaders. And it was thereby further declared that the premises stated to be in the occupation of the Reverend J. Mortimer, and the said school-house, were further limited to the trustees therein named upon such and the same trusts as were expressed or declared in and by

the same indenture of the 8th of May, 1782, of or concerning the premises therein comprised, or upon * or for such and so many of the same trusts as were applicable to the premises stated to be in the occupation of the said Reverend J. Mortimer and the said school-house, and upon no other trust whatever.

The information stated a further purchase by the trustees, and a conveyance to them of the 25th of April, 1843, of a small piece of land adjoining the other premises upon the trusts declared by the deed of the 8th of September, 1835, or such of them as were then subsisting and applicable to the land thereby conveyed; that the purchase-money for this ground was provided by voluntary contributions and otherwise as the purchase-money for the original property had been raised, and that the advances mentioned in the deed of 1782 had been long since repaid with interest.

The information then stated the deed-poll of the 28th of February, 1784, executed by John Wesley, whereby he settled the regulations and powers of the "Conference" declaring the persons being 100 in number of whom it was to consist, that their meetings should be annual and the act of their majority to be binding, that vacancies should be supplied and officers be chosen by the Conference, that they might admit into or expel persons from connection with their body or admit persons upon trial to be preachers and expounders of God's holy Word, that they should not appoint any person to the use and enjoyment of any chapels belonging to the Methodists who was not either a member of Conference or admitted into connection with them, or upon trial, nor appoint any

person for more than three years to any chapel except ordained ministers of the Church of England, and that whenever the Conference should be reduced to forty for three yearly assemblies, or should neglect to meet for three years, its powers should cease, and the chapels * should vest in the trustees upon * 603 trust to appoint preachers and to use and enjoy the same as to them should seem proper. The information stated that these regulations were assented to by the entire body of the Methodists, and had since been invariably accepted and adhered to by that body. It stated also that the supreme government of the body had vested in the Conference exclusively, subject to the regulations in the deed-poll since the death of John Wesley in 1791.

The information then stated the steps taken by the Conference to perfect the organization and secure the discipline of the Methodist body: the constitution of districts in 1791, under which the Birstal circuit came within the Leeds district, and the settlement of the scheme of trusts for their meeting-houses and other properties in the form expressed in the "model deed" of the 3d of July, 1832, the adoption of which was recommended by the Conference to the connection at large, and by which model deed a piece of ground, intended to be the site of a meeting and dwelling house, school-room and burial-ground, at Halifax in Yorkshire, was conveyed to trustees, upon trusts suitable to such property belonging to Methodists, providing for the erection, repair, and rebuilding of the edifices, the appropriation of the meeting-house for the exclusive use of the ministers or preachers appointed by the Conference, and of the school-rooms for schools under its regulation, and containing also power for the trustees to mortgage the property; to secure debts of the trust; to let the pews and houses and dispose of the graves; receive the income; pay the outgoings and expenses, including interest on trust debts; and to apply the surplus towards the support of the preachers or other specified purposes beneficial to the Methodists, with provisions for the meetings of the trustees, auditing of the accounts for sale of the trust * property with consent of the Conference, * 604 and in certain cases without such consent, for the application of the proceeds for specified purposes beneficial to the body, and for the appointment of new trustees.

The information averred that the declarations of trust of the properties acquired in 1751, 1809, and 1812 were none of them

contemporaneous with the acquisition of the property ; that the declaration of 1751 was originally defective, and that the lapse of time and alteration of circumstances had rendered it inappropriate, and that the declarations of 1835 and 1843 were also defective and inappropriate ; that the paramount intention of the purchasers of 1751 was that the property should be held by the trustees for a meeting-house in accordance with the constitution of Methodism ; and that the paramount intention of those who acquired the other premises subsequently was that they should be held and appropriated upon trusts ancillary to the chapel trust and in accordance with the constitution of Methodism, having regard to the different natures of the properties. The information stated that, with the consent of the trustees, the society at Birstal, and the preachers or ministers, stewards, class-leaders, and other officers thereof, had always had and enjoyed the actual occupation of the premises, in conformity with the original intentions and the constitution of Methodism, which had in some respects led to acts not apparently provided for by the declarations of trust ; that it was not in accordance with the constitution of Methodism that the appointment or removal of the preachers or ministers of a chapel should belong to the trustees ; that the entire control over the stationing and removal of preachers or ministers was inherent in the Conference ; that it was not possible to obtain the services of preachers or ministers belonging to the Methodist body otherwise than

* 605 in accordance with the provisions of the * deed-poll ; and that the trustees had never appointed or removed any of such preachers or ministers.

The information stated that in 1846 a debt of 1150*l.* was owing on the trust account in respect of so much of the cost of the purchases and buildings as had not been raised by voluntary subscription, and that the debt was in the same year increased to 1800*l.* by the excess of expense in the rebuilding and enlargement of the chapel beyond what was raised by subscription ; that the course had been to borrow this money on the promissory notes of the trustees, which were renewed and changed from time to time ; and the information stated the names of the makers and payees of the existing notes, and the sums respectively due upon them.

The information, after stating a resolution which the trustees had made in 1846 for the appointment of some new trustees and the settlement of the chapel affairs upon the Conference plan,

stated that there were now four vacancies in the trusteeship; that five of the defendants, J. Fawcett, D. Hopkinson, A. Livesey, B. Sands, and W. Burrell, had ceased to be members of the Methodist body, and had joined some other religious communions; that they ought to be removed from being trustees, and that new trustees should be appointed. And the information averred that the Conference was sufficiently represented in the suit by the defendants the Rev. John Scott, the president, and the Rev. J. Farrer, the secretary.

The information prayed that it might be declared that the meeting or preaching house, chapel, lands, and premises comprised in the deed of 1751 were acquired by the original trustees, subject to trusts appropriating the same as a place of religious worship for the people called * Methodists in the connection of * 606 the late John Wesley, and to be used in accordance with the religious constitution of the said people; and that it might be declared that the buildings, lands, and premises comprised in the deeds of 1809, 1812, and 1843, respectively, were acquired by the trustees subject to trusts appropriating the same for purposes corresponding with or auxiliary to the purposes for which the premises comprised in the deed of 1751 were then applicable; and that it might be declared that the deeds of 1751, 1809, 1812, and 1843 did not sufficiently declare or adequately provide for the objects of the foundations, and that the trust premises ought henceforth to be held and appropriated by the trustees thereof for the time being, upon such scheme of trusts as would best effectuate the object of the foundations, regard being had to the existing circumstances of the case. That, if the Court should think proper, the five defendants who had ceased to be members of the Methodist body might be removed from being trustees, and that new trustees might be appointed to supply the existing vacancies and any other vacancies occasioned by the decree; and that, if it should appear to the Court that the "model deed" of 1832 contained a fit and proper scheme of trusts for carrying the objects of the aforesaid foundations into effect, regard being had to any declarations the Court might make on the subject, and regard being also had to the existing circumstances of the case, then that the trust properties might be vested in the continuing and new trustees, upon the trusts of the said "model deed;" or, if the Court did not approve of the "model deed," then that the Court might approve and settle a

scheme of trusts fit and proper for carrying the objects of the foundation into effect, and that the trust properties might be vested upon the trusts embodied in such scheme.

* 607 * When the cause came on to be heard before the Vice-Chancellor Wood, (a) the defendants J. Fawcett, D. Hopkinson, A. Livesey, B. Sands, and W. Burrell, five of the trustees of the chapel, who dissented from the views of the relators, appeared and opposed the relief sought by the information. The Vice-Chancellor, however, being of opinion that the relators were entitled to a declaration establishing the right of the Conference to appoint the preachers to the chapel in question, made the following decree: "1. It appearing to the Court that, at the date of the indenture of the 3d day of December, 1751, in the information filed in this cause mentioned, the building called 'The new meeting-house' therein mentioned, situate at Birstal, in the county of York, was erected by and for the use of the society originally formed under the ministry of John Nelson in the said information mentioned; and that, at the date of the said indenture, such society had been united to and formed part of a larger association organized by the Rev. John Wesley, and by him styled 'The people called Methodists;' and that such larger association consisted of societies, several of which were respectively united together in circuits; and that, for each of such circuits, travelling preachers were from time to time appointed to minister in the chapels of the circuit by the said John Wesley, with the advice of certain preachers called together by him to a yearly conference, one of which preachers was styled 'the assistant,' and was appointed to take charge of the societies in the circuit and of the other preachers therein, and that such travelling preachers alone performed the regular ministrations and services in the several chapels of the circuit; and it further appearing that, at the date of the said indenture, the said society at Birstal was united with several other societies in a circuit called the Birstal circuit. 2. This Court doth declare that the

* 608 said meeting-house * or chapel and premises in the said indenture mentioned were intended and ought at all times to be used, occupied, and enjoyed as a place of religious worship for the said society at Birstal of the said people called Methodists, and for such other services and meetings as may be duly held

(a) 10 Hare, 540.

therein, in accordance with the rules and regulations of the said people called Methodists. 3. And doth declare that, according to the true intent and meaning of the said indenture, the preacher or minister therein referred to and directed to be appointed as therein mentioned, was intended to be and ought at all times to be one of the preachers of the circuit of which the said society at Birstal may form a part. 4. And it further appearing to the Court that the said circuit preachers, and in particular those of the Birstal circuit, were, at and before the date of the said indenture and at all times thereafter during the lifetime of the said John Wesley, appointed either by the said John Wesley with the advice of the said Conference, presided over by the said John Wesley; and that during the lifetime of the said John Wesley the members of such Conference were defined, and the mode of continuing the same regulated by a certain deed-poll, dated the 28th day of February, 1784; and that, since the death of the said John Wesley, the appointment of all the circuit preachers, and in particular of the preachers in the said Birstal circuit, has been made, and that according to the rules and regulations of the said people called Methodists such appointment ought to be made, by the said Conference only. 5. This Court doth declare that the trusts contained in the said indenture with reference to the appointment of a preacher in the said chapel, after the decease of the survivor of John Wesley, Charles Wesley, and William Grimshaw, therein mentioned, by the major part of the trustees for the time being of the said indenture, cannot * be carried into effect consistently with * 609 the due appointment of such preacher or minister as by the said indenture was intended to be provided for the said chapel; and that the said trust premises ought at all times to be held by the trustees for the time being, acting under the said indenture, upon trust to permit and suffer such persons, being preachers or ministers of the Birstal circuit, or of the circuit of which the said society at Birstal may for the time being form part, as shall from time to time be duly appointed by the said Conference for that purpose, to have and enjoy the free use and benefit of the said trust premises in accordance with the trusts hereby declared; and also to permit such services and meetings to be performed and held therein, and by such person or persons, and in such manner, as shall be in accordance with the rules and regulations of the said people called Methodists. 6. And doth declare that the indenture

of the 8th day of May, 1782, in the said information mentioned, so far as it purports in any way to vary the trusts in the said indenture of the 3d day of December, 1751, contained, with reference to the nomination and appointment of trustees under such indenture, or with reference to the nomination and appointment of a minister or preacher, and so far as it purports to confer on the persons therein named or described the power of removing or suspending any preacher or minister, or otherwise to subject the premises therein comprised to any trusts which are inconsistent with the rules and regulations of the said people called Methodists, is void and of no effect."

The decree proceeded to deal in like manner with the deeds of 1809, 1812, and 1843. It did not remove the five defendants who opposed the views of the relators, and it gave all parties their costs of the suit, to be raised by sale or mortgage of the trust premises.

* 610 * The five defendants, who opposed the views of the relators, now appealed to the Lord Chancellor.

The following works and documentary evidence were referred to during the argument, as affording evidence or information relating to the origin and foundation of the trusts generally, and the intentions of John Wesley with regard to them, and to the foundation of the Birstal society and meeting-house. The original rules of the society signed by John and Charles Wesley, dated 1743, in the eighth volume of Wesley's Life and Works; Grindrod's Compendium of the Laws and Regulations of Wesleyan Methodism: Myles's Chronological History, two editions, which varied in some particulars; and the journal of Mr. John Nelson, preacher of the gospel, published in 1851, and the Minutes of Conference. It was also in evidence that in the Minutes of Conference of the year 1749, when questions had arisen as to the proper mode of settling the chapels intended to be appropriated to the Methodist body, a form of a deed prepared under the sanction of John Wesley was given, whereby the object might most conveniently be obtained; and it appeared that the deed of 1751 corresponded in almost every particular with the model deed of 1749, with the exception that in the deed of 1749 the power of appointing preachers after the death of John and Charles Wesley was given to the Conference, while, by the deed of 1751, such power was expressly conferred on the trustees for the time being of the chapel. Some

entries in the journal of Mr. John Nelson, preacher of the gospel, published in 1851, were sought to be used by the relators as evidence; but the Lord Chancellor refused to admit them as such without further proof of their authenticity. The journal contained the following letter from John Nelson to John Wesley, and was referred to frequently in the argument, and also commented upon in the judgment of the Vice-Chancellor Wood:—

*“ Dear Father in the Lord,— My most earnest prayers * 611
with my best love for you and your brother are, that God
may prosper his work in your hands more and more. . . . The
stewards and trustees of the chapel we are building, and which is
now slated, desire you to give them advice how the writings must
be made which are to convey the power into the hands of seven
men to be as trustees, and for what use the house and ground are
to be employed; and, as it is intended for pious uses, whether it
must not be enrolled in Chancery. They desire you to send a
copy of the deeds of some of the houses you have been concerned
in as soon as possible, for all is in the hands of one man, and if
he should die it would cause great confusion before things could
be properly settled. We all desire an interest in your prayers and
your advice in this particular. God hath opened the hearts of the
people beyond expectation, and we trust he will send help from
some quarter that we may finish what we have begun in his name.
I am employed in hewing stones in the daytime, and at night call-
ing sinners to the blood of Jesus. My wife joins with me to you
and your brother and all the Church of God in that place. We
think you are long in coming to see us. May God hasten you
hither.

“ I am your unworthy son in the Gospel,
“ Birstal, Yorkshire, JOHN NELSON.”
“ August 19, 1750.”

Mr. Rolt and *Mr. Little*, for the relators, in support of the Vice-Chancellor's decree. — We submit, first, that the deed of 1751 does not correctly represent the wishes and intentions of the original founders, and that it ought to be rectified: and, secondly, if the Court is of opinion that there is no mistake in the deed, then that, having regard to the evidence in the cause, it is manifest that the deed does not adequately * provide for the objects * 612

which the founders had in view ; and that in order to effectuate the paramount intention of the founders, which was to appropriate the chapel as a place of religious worship for the people called Methodists in the connection of John Wesley, the power of appointing preachers ought to rest in the Conference alone ; and, therefore, the provision in the deed vesting the power of appointment in the trustees must be rejected as being inconsistent with such paramount intention. In fact, the deed itself shows that we must look beyond it for the proper exposition of its trusts, and that it must be re-formed as not accurately representing the intentions of the original subscribers, who alone, and not the trustees, must be regarded as the competent authorities to declare the nature of the trusts. *Price v. Hathaway.* (a) The necessary result of not re-forming the deed in this particular is to withdraw the chapel from the Conference altogether. The journals of John Wesley and John Nelson clearly show that their views of the character and object of the deed of 1751 were such as that the regulation of the discipline and doctrine of the chapel should be subordinate to the Conference, the powers exercised by which body is the necessary and legitimate development of the system of John Wesley himself, and an essential part of the constitution of Methodism.

[THE LORD CHANCELLOR. — Nelson's journal, printed upwards of a hundred and twenty years after it was composed, cannot be admitted as evidence of facts occurring a hundred and twenty years before it was printed.]

The defendants have admitted its authority.

[THE SOLICITOR-GENERAL. — But we have not admitted its admissibility as evidence.]

They are clearly admissible as containing contemporaneous historical evidence of the meaning of the words of the deed of * 613 1751, directing the appointment of preachers to * expound God's holy Word in the same manner as it was then expounded in the lifetime of John and Charles Wesley. *Shore v.*

(a) 6 Mad. 304.

Wilson. (a) In the case of *Attorney-General v. Drummond*, (b) Lord St. LEONARDS said, "What I am prepared to act on subject to correction is this: I shall admit evidence, or, if not furnished, I will, if necessary, look for evidence in history, in records and Acts of Parliament, in the knowledge of the times, in the writings of men of different persuasions on ecclesiastical subjects. . . . I reject, therefore, at once, all evidence which goes to show what the founders thought, what their opinions were, in order to put a construction on this deed; but I shall not exclude evidence to show me what they did.

The length of time which has elapsed affords no bar to the relief prayed, for if it is either admitted or proved that the deed as drawn was not in accordance with the spirit of its founders, this Court will rectify it after any lapse of time: *The Attorney-General v. The Earl of Stamford*; (c) especially when the practice of appointing preachers has confessedly rested with the Conference, and been exercised by them for upwards of seventy years. We also rely upon the observations of the late Vice-Chancellor of England in the case of *Dr. Warren*, which is to be found in Grindrod's *Compendium*, p. 371, App. III., where his Honor is reported to have said, "It is to be observed that the deeds of trust are not, according to my humble apprehension, to be construed merely with regard to the words that may happen to be contained in the deeds themselves, but must be construed and looked at as part and parcel of the whole machinery by which the great body of Wesleyan Methodists, * amounting to, I believe, nearly a million * 614 of people, is kept together, and by which Methodism is itself carried on. I think I should take a very narrow view of the case if I contented myself with merely looking at the words of the trust deed, and not going further, and considering whether, from the very nature of the transaction and the matters connected with it, some circumstances extrinsic of the deed must not be taken into consideration."

Though we should not have appealed on the points, yet we submit that the Vice-Chancellor has miscarried in not removing the five trustees whose avowed opinions are in hostility to that of the

(a) 9 Cl. & Fin. 355.

(b) 1 Dr. & War. 353; see p. 375; S. C. on appeal, 2 H. L. Cas. 837.

(c) 1 Phil. 737.

Conference, *In the Matter of the Norwich Charities*, (a) and we rely on the observations of your Lordship in the case of *The Attorney-General v. Hardy* (b) as to the expediency of removing trustees whose conduct clearly indicates a want of sympathy with the feelings and interests of those of whose rights they are the guardians. The decree is also wrong in allowing the defendants their costs out of the estate.

Mr. W. M. James appeared for the president and secretary of the Conference, and for the trustees who supported the views of the Conference.

The Solicitor-General, Mr. Craig, and Mr. Cairns, for the defendants, the five trustees, who were the appellants. — There is not one tittle of legitimate evidence in support of the plaintiffs' contention, which rests solely on assumption that the deed of 1751 did not carry into effect the wishes of the original subscribers; nor is there any thing in the pleadings to justify a declaration to that effect. On the contrary, the express provision in the deed itself, which furnishes the best exposition of the paramount intention, negatives such assumption: and no extrinsic evidence is admissible to contravene its plain import. Thus, in the language of Baron PARKE, in his opinion in the House of Lords in *Lady Hewley's Case*, "The deed must speak for itself, no matter what she intended to have done, even though it should be proved by her own mouth, still less what it may be supposed she wished to have done. The sole question is, what is the meaning of the deed?" *Shore v. Wilson*. (c) And to the same effect are the observations of Lord ST. LEONARDS in the case of *The Attorney-General v. Drummond*, (d) and Lord COTTENHAM on appeal; (e) nor is either of these cases an authority for the admission of the journals of Wesley or Nelson, or Myles's Chronological History, the two editions of which do not agree. The utmost latitude which has been allowed with respect to the reception of extrinsic evidence has been to admit the history and literature of the day to expound the terms used in the vocabulary of the

(a) 2 M. & C. 275.

(b) 1 Sim. N. S. 338; see p. 357.

(c) 9 Cl. & Fin. 355; see p. 558.

(d) 1 Dru. & War. 353.

(e) 2 H. L. Cas. 837.

age with respect to matters of doctrine, but history cannot be received as a proof of a private right or a particular custom. 2. Phill. on Evidence, p. 123, ed. 9. Here the evidence is received, not with reference to a matter of doctrine, but of fact. And even assuming that extrinsic evidence might have been admissible to explain any ambiguity on the face of the deed, yet in the present case the deed is not only not ambiguous, but most explicit. John Nelson's letter is clearly inadmissible, but, if admitted, it contradicts the Vice-Chancellor's theory as to the constitution of Methodism, and of the preachers being necessarily itinerant; for John Nelson describes himself as "hewing stones in the daytime and winning * souls at night;" and the very fact of the deed * 616 of 1751 being different from the "model deed" of 1749 in the particular as to the appointment of preachers after John Nelson's inquiry of Wesley how "the writings were to be made" with reference to the conveyance to the trustees, is a proof, if proof were wanting, that the original subscribers did not intend, while deferring to the supremacy of John Wesley, to bind themselves to the authority of an unknown body who might succeed him. If it is true that the authority of Conference with respect to the appointment of preachers is essential to the constitution of Methodism, then it is equally true that the original subscribers of the deed of 1751 did not intend to become part of that constitution. The Vice-Chancellor has said that the power of appointing the preachers ought to be in the Conference, and that in so declaring he is giving effect to the paramount intention of the founders; but the doctrine of paramount intention, though sometimes applied in the construction of wills, is never applied in construing deeds: he has also said that the power of appointing the ministers of this chapel cannot rest with the trustees, without being repugnant to the constitution of Methodism; but the best refutation of such a doctrine is the fact that John Wesley himself, after the date of the deed-poll of 1784, by his will devised the chapel at Bath to trustees to appoint its ministers. It is also to be observed that the deed-poll of 1784, which is in part only set forth in the information, does not warrant the deduction that this chapel was intended to be handed over to the authority of Conference, for that deed was only applicable to chapels settled in a manner in which this was not; namely, to those chapels founded either by Wesley himself or others, but in each case where the power of appointment was ultimately

vested in the Conference, the object being to define the term
 * 617 'conference.' * Moreover, applying the principles laid down
 in *Lady Hewley's Case*, (a) the Conference, after the death
 of Wesley, being a very differently constituted body, both in doc-
 trine and discipline, from that founded by and co-existent with
 John Wesley, and in one essential particular, viz., that of separa-
 tion from the Church of England, would not be entitled to appoint
 the preachers.

With respect to the argument drawn from the usage of Confer-
 ence in appointing preachers to this chapel, the answer is that no
 usage can prevail against an express declaration of trust, or in the
 words of Lord COTTENHAM, "Contemporaneous usage is, indeed, a
 strong ground for the interpretation of doubtful words or expres-
 sions, but time affords no sanction to established breaches of trust:"
Drummond v. The Attorney-General; (b) nor can the argument
 be ever legitimately advanced, except where the instrument is in
 ambiguous language: Shelford on Charitable Uses, p. 562; *Attor-
 ney-General v. Murdoch*; (c) *Attorney-General v. Pearson*. (d)
 The evidence in this case goes the length of showing acts amount-
 ing only to an usurpation; but the fact is, that the trustees have
 never relinquished the right, though they have been all along desi-
 rous of acting harmoniously with the Conference. That this right was
 not only never relinquished, but never intended to be relinquished,
 is clearly shown by reference to the articles of pacification, as
 given in the first volume of the Minutes of Conference, page 322,
 where there is an express recognition and reservation of the rights
 of trustees generally. "Nothing in these articles to affect the
 rights of trustees." The analogy of the second section of the Act 7
 & 8 Vict. c. 45 (the Dissenting Chapels' Act) is in favour of our
 contention, excluding usage, as the key to religious doctrine,
 * 618 in every * case where there had been a clear and express
 definition to the contrary in the will, deed, or other instru-
 ment declaring the trusts of any meeting-house. With respect to
 the removal of the dissentient trustees the Vice-Chancellor has
 rightly held that there is no ground for their dismissal. There
 is a great distinction between such a case as the present, where
 it is sought to substitute new trustees when there is no vacancy,

(a) 9 Cl. & Fin. 355.

(c) 1 De G., M. & G. 86.

(b) 2 H. L. Cas. 837; see p. 861.

(d) 3 Mer. 400.

and a case under the Municipal Corporations Act, *In the Matter of the Norwich Charities*, (a) where the Lord Chancellor has to appoint new trustees, there being none in existence.

Mr. Rolt, in reply. — The deed of 1751 corroborates our view, by providing that the trustees should appoint a preacher monthly or oftener, which necessarily implies that he should be an itinerant and in connection with the constitution of Methodism. With respect to the argument drawn from the reservation of the rights of trustees generally in the articles of pacification, it would be absurd to draw such an inference, as that would imply that the framers of those articles had devised a scheme which should frustrate its essential and vital principle of action, and more particularly when the reservation can be satisfactorily explained by referring it to the maintenance intact of the rights of trustees with respect to the secular economy of the chapels, such as the management of pew rents, &c. As to the frame of the information not in terms praying for the relief obtained, this, being a charity, clearly gives the Court jurisdiction to extend other relief than that prayed. *The Attorney-General v. The Coopers' Company*; (b) *Attorney-General v. Brereton*. (c)

* THE LORD CHANCELLOR. — This was an information at * 619 the relation of two gentlemen, members of the society of Wesleyan Methodists at Birstal in Yorkshire, its object being to obtain the direction of this Court as to the proper mode of administering certain of the trusts relating to a chapel at Birstal, created by several deeds set out in the information.

The earliest deed, and that on which in truth the others depend, is a deed dated the 3d December, 1751. [His Lordship here briefly stated that deed, and its effect (see *ante*, page 593), and proceeded:] That was the original deed. It may be taken as established that, from the time of the execution of this deed up to the year 1782, its trusts were duly executed. Mr. Wesley from time to time appointed a preacher, who duly preached and expounded the Word of God in the Birstal chapel according to the terms of the deed. In that year, 1782, nine of the nineteen trustees named in the deed of 1751 had died, and the ten survivors, by a deed of bar-

(a) 2 M. & C. 275.

(b) 19 Ves. 187.

(c) 2 Ves. 425.

gain and sale enrolled, dated the 7th May, 1782, conveyed the trust property to ten new trustees, to hold to them to the use of themselves and the nine survivors. John Wesley and Charles Wesley are named as conveying parties with the surviving nine trustees. John Wesley executed the deed, but Charles Wesley did not. I may observe, in passing, that the effect of this deed was to vest the legal estate in the ten new trustees only, but this is not material. In almost all these bargains and sales the property was conveyed to persons to the use of them and the old trustees; but I have looked attentively at them all, and probably it would not have made any difference, but in every case the preceding trustees had died, so that it was immaterial whether the legal estate was vested in the new ones solely or in the new ones jointly with the preceding persons.

On the next day another deed was executed by the same
 * 620 * persons as had executed the former, for the purpose of declaring the trusts on which the property was to be held. [His Lordship here stated the purport and effect of this deed (see *ante*, page 595), and proceeded:] It appears, therefore, that, before the year 1782, additional buildings had been erected on the trust property, and that a considerable enlargement of the chapel was then contemplated, to provide for which a sum had been raised by voluntary contributions, and further sums were agreed to be advanced on security of pew rents. The declaration of trust provided for raising these rents by the trustees and for the application of the money to the liquidation of the contemplated debt and the support of the preacher. During the life of Mr. John Wesley, who in fact survived his brother Charles, the preacher was to be appointed by him, as had been provided by the deed of 1751. After his death the appointment was to be made by the trustees, not alone, as had been stipulated by the former deed, but in conjunction with the class-leaders of several adjoining villages enumerated in the deed.

The information states that shortly after the date of these deeds the preaching-house was completely rebuilt. In the years 1809 and 1812, two small pieces of land adjoining the meeting-house, on one of which a house had been built, were duly conveyed to Thomas Crowther and Amos Street and their heirs; and though no declaration of trust was then executed by them, it may be taken as established that these conveyances were made in order that the

land conveyed might be taken as an addition to the original property, and for the greater convenience of its occupants. Before the year 1818, all the original trustees of 1751 and seven of the nine additional trustees appointed in 1782 had died, so that the whole of the original property had become vested in the two only surviving trustees of the deed of 1782.

* These two surviving trustees, by a deed of bargain and * 621 sale enrolled, dated the 22d January, 1818, conveyed to seventeen new trustees to the use (as expressed) of themselves and such new trustees; and by another deed of the same date, Crowther and Street conveyed the lands vested in them to the use of the same nineteen trustees, in whom the original property then was or was supposed to be vested.

Previously to the year 1835, nine of the trustees died, and five of the remaining ten were desirous of retiring from the trust, and accordingly, by an indenture of bargain and sale enrolled, dated the 7th September, 1835, the ten surviving trustees conveyed all the trust premises to fourteen new trustees to the use of themselves and the five old trustees who did not wish to retire, and their heirs.

By a declaration of trust, dated on the following day, namely, the 8th September, 1835, and made by the five continuing and the fourteen new trustees, it was declared that the property was to be held upon trusts substantially the same as had been declared by the deed of 1782, except that one of the villages, the class-leaders of which were, according to the deed of 1782, to concur with the trustees in appointing the preacher, was omitted in the deed of 1835. Nine villages were named in the former, and only eight in the latter deed.

By indenture of bargain and sale dated the 25th of April, 1843, another small piece of ground adjoining the chapel was conveyed to the trustees of the deed of 1835, or rather to the seventeen survivors of them, for two had died in the mean time, on the trusts declared by the deed of 1835.

In 1846 the chapel was rebuilt on an enlarged scale, * and there is a debt of 1800*l.* incurred in such rebuilding, * 622 and in former alterations and repairs now charged on the property. At or about the time of the last alterations and rebuilding, disputes arose as to the right of appointing the preacher, the trustees or some of them contending that, under the several deeds

to which I have referred, the right is in them either alone or jointly with the class-leaders of the eight or nine villages adjoining Birstal, whereas the relators and others of the trustees contend that the right is not in the trustees, but in the body called the Wesleyan Conference. That body may be considered as owing its actual, definite form and character to a deed-poll under the hand and seal of John Wesley, dated the 28th February, 1784, though it had unquestionably existed for very many years previously. That deed-poll is thus stated in the information: [His Lordship here read the statement from the information (see *ante*, page 602), and observed:] On referring, however, to a printed copy of the deed itself, which is admitted to be accurate, I find that the information has not given a correct statement, or rather has not given all that is considered by the appellants as material to the proper understanding of that deed. His Lordship here referred to the recitals that divers buildings called chapels had been given and conveyed by John Wesley to certain persons and their heirs on trust that “the trustees should permit and suffer John Wesley and such persons as he should appoint during his life to have and enjoy the free use and benefit of the premises to expound God’s holy Word therein, and then after his death that they should in like manner permit and suffer Charles Wesley, his brother, or such persons as he should appoint, and after the decease of the survivor of them, John Wesley and Charles Wesley (the third gentleman Grimshaw, it may be remarked, had died previously to this time),

then on the further trust that the trustees and the survivors
 * 623 of them, their heirs and assigns * in the trusts for the time being should permit and suffer such persons and for such time and times as should be appointed at the yearly Conference of the people called Methodists to enjoy the property and preach therein.” That was a recital as to chapels which Mr. Wesley had himself given for these purposes. The next recital is — “And whereas divers persons have in like manner given or conveyed many chapels on the same trusts, and for rendering effectual the trusts created by the said several gifts or conveyances, and that no doubt or litigation may arise with respect unto the same or the interpretation or true meaning thereof, it has been thought expedient by the said John Wesley, on behalf of himself as donor of the said chapels with the messuages, dwelling-houses, or appurtenances before mentioned, as of the donors of the said other

chapels with the messuages, dwelling-houses, or appurtenances to the same belonging, given or conveyed to the like uses and trusts, to explain the words 'yearly Conference of the people called Methodists,' contained in all the said trust deeds and to declare what persons are members of the said Conference." Then it goes on and declares that "this Conference hath always heretofore consisted of the preachers and expounders of God's holy Word, commonly called Methodist preachers, in connection with and under the care of the said John Wesley, whom he hath thought expedient year after year to summon to meet him in one or other of the said places of London, Bristol, or Leeds, to advise with them for the promotion of the Gospel of Christ to appoint the said persons," &c. Then it declares who are the present members of the Conference, and the mode in which that body is to be kept up for the future. The distinction between the deed itself and the statement of it in the information being that, by the deed itself, it appears that this definition of the persons who were to constitute the body called the Conference was made with reference to those chapels * only in which after the death of John * 624 Wesley the appointment was to rest with them. In truth, for any other purpose it does not seem material that such a deed should have been executed. The litigation and doubt which it was the object of Mr. Wesley to prevent was a litigation and doubt as to who were to be the persons actually entitled to appoint to these chapels after his death, when the appointment had been vested in a body called the Conference. That was what was put forward on the part of the defendants who have appealed.

The relators contend that, looking to the history of this chapel, its original connection with John Wesley, and the manifest object of its founders, the appointment of the preachers must rest with the Conference, for that a right of appointing preachers in any other body would be inconsistent with, and subversive of, the whole principle of the Methodist connection, and the main object of the present information is to establish this right in the Conference. It states the original deed of 1751, and the subsequent deeds relating to the chapel and the other trust property, and also the deed-poll of 1784, by which the Conference was organized, and the three first paragraphs of the prayer are as follows: [His Lordship read them, see *ante*, page 605.]

The point for decision is, whether the relators have established

a title to this relief. That they are not entitled to what they ask, on the face of the deeds themselves, is quite certain. The provision as to the appointment of preachers after the death of John Wesley, Charles Wesley, and William Grimshaw, i.e. after the death of John Wesley, for he was the survivor, is perfectly clear. There is a variance between the original deed of 1751, and the subsequent deeds of 1782 and 1835, the former having

* 625 vested the appointment in the trustees * alone, the latter in them together with the class-leaders of some parishes or villages near Birstal ; and, again, there is a variance between the two latter deeds, for one of the villages named in the deed of 1782 is not named in that of 1835 ; but on no possible construction of any of the deeds could it be contended that under them the Conference had any title whatever.

Indeed, this was not disputed ; but it was argued that either the original deed must be corrected as not correctly representing the intentions of its framers, or, if this cannot be done, then that looking to all the evidence in the cause, it is plain that the deed does not adequately provide for the object which the founders of the charity had in view, and so that relief must be given in spite of the deed, in order to carry into effect the paramount object of the founders not fully accomplished by the deed.

On the first point, that the Court ought to correct the deed, or to act on it as if corrected, I need hardly say much. The proposition, though made, was but feebly insisted on. Indeed, it must have been felt to be untenable. The argument was, that the parties competent to declare the trusts were not the trustees, but those who subscribed the funds by which the property was purchased. But, in the first place, I can discover no evidence showing conclusively that the whole of the money was not subscribed by the nineteen persons to whom the property was originally conveyed. Even if the contrary of this were shown, and it were made out by sufficient proof according to what is certainly the great probability of the case, that other persons besides the nineteen bargainees named in the deed of 1751 had contributed to the purchase, still I think it must, in the absence of proof to the contrary, be taken

for granted that those other persons either knew and ap-
* 626 proved of the trusts actually * declared, or else were content to delegate to the trustees the power and duty of declaring them. I agree with the Vice-Chancellor Wood in his observations

on this part of the case. Where a fund is raised for a charitable purpose like that of founding a chapel, and the contributors are so numerous as to preclude the possibility of their all concurring in any instrument declaring the trusts, but such a declaration is made by the persons in whom the property is vested, at or about the time when the sums have been raised, that declaration may reasonably be taken *primâ facie* as a true exposition of the minds of the contributors. The presumption is that the trusts declared were those which the contributors intended. It would be open to them, if the trusts were not so framed as to effect the object they had in view, to take steps for getting any error corrected. If no such steps are taken, it must be assumed that the instrument declaring the trusts fairly embodies the intentions of the contributors. The present information must, therefore, be disposed of on the assumption that the deed of 1751 was such as the founders of this charity meant it to be.

Starting, however, from that as an admitted proposition, the relators contend, they have shown by a great body of parol evidence relating partly to the rise, progress, and final establishment of the Methodist body, and partly to the circumstances connected with the foundation of this chapel, that whatever may be the provisions of the deed, the founders had in view a paramount object, to which it must be understood they meant the provisions of the deed, if necessary, to give way. The paramount object of those who founded the chapel was, it is said, to appropriate it as a place of religious worship for the people called Methodists in the connection of the Rev. John Wesley, to be used in accordance with the religious constitution of the said people. It is further said to be inconsistent * with that constitution that the * 627 preacher should be appointed by any other authority than that of the Conference; and, therefore, the provision in the deed of 1751, vesting the power of appointment in the trustees, must be rejected as being inconsistent with the great primary object of the founders. This view of the case is substantially adopted by the Vice-Chancellor, as appears not only from the able review of the facts which are found in his reported judgment, but also from the decree itself, which fully states the ground on which the relief is given. [His Lordship here read the first seven paragraphs of the decree (see *ante*, page 607), and continued:] The following declarations have reference to the other deeds whereby the subse-

quently acquired property of the Birstal chapel was conveyed upon the same trusts.

Now, speaking with all the diffidence which any Judge must experience when differing from the Vice-Chancellor WOOD on any point, and more especially on one which has evidently received so much thought and attention from him as the present case, I confess I do entertain a very decided opinion that this is a purpose for which parol evidence is altogether inadmissible. In *Lady Hewley's Case*, *Shore v. Wilson*, (a) and in the later case from Dublin, *Drummond v. Attorney-General*, (b) parol evidence was received only to enable the Court to understand and construe the deed under which the trusts existed. The great question in the former case was as to what was the sense in which the words "godly preachers of Christ's holy gospel" were to be understood in the deed creating the trust; and in the latter, the question was in like manner as to the meaning of the words "Protestant dissenters." In both these cases the parol evidence was neces-

* 628 sary, in order to enable the Court * rightly to understand the deed. Certain words were used which it was necessary to construe, and this could not be done without admitting a great deal of evidence as to the state of religious parties at the time when the deeds were framed. For such a purpose the evidence was most reasonable. It was like the evidence afforded by a dictionary, which enables us to translate a foreign language; or a book of science, which gives us the meaning of words of art. But neither the authority of Lord LYNTHURST in this Court, nor of Lord ST. LEONARDS in Ireland, nor, finally, of the House of Lords which sanctioned the admission of such evidence in the two cases I have referred to, afford any support whatever to its reception in this case, where it is looked to not for the purpose of enabling the Court better to understand the deed, but for the purpose of proving that the provision in the deed giving the appointment of the preachers to the trustees would, after the death of Mr. Wesley, clash with the general system of Methodism, which it is supposed would not have been intended by the founders.

It was indeed argued on the part of the relators, and the argument was to some extent relied on by the Vice-Chancellor in his judgment, that parol evidence was necessary for explaining that

(a) 9 Cl. & Fin. 355.

(b) 1 Dru. & War. 353; S. C., on appeal, 2 H. L. Cas. 837.

part of the deed which relates to the preaching. The preachers, to be from time to time appointed, were to preach and expound God's holy Word "in the same manner, as near as may be, as God's holy Word is now preached and expounded there." If there were now any question as to how God's holy Word was preached and expounded in the chapel in the year 1751, parol evidence would be clearly admissible for clearing up that doubt. But I think that passage merely refers to the doctrine inculcated and the mode of inculcating it. It cannot surely have any reference to the mode of appointing the preachers or the persons by whom the appointment * was to be made, considering that * 629 the provision is, that after Mr. Wesley's death the trustees shall appoint a fit person to preach and expound in the same manner, as near as may be, as God's holy Word is now preached and expounded. The preachers were then, as appears from the deed, appointed by Mr. Wesley. The deed provides that he shall continue to appoint them during his life, but that after his death the trustees shall appoint; the words which follow relate clearly to the duties of the preacher, and not to the mode of his appointment, and I repeat, that for the purpose of regulating those duties, by showing in what manner God's holy Word was preached in 1751, if that had been a matter in controversy, parol evidence would have been admissible; but no question has been raised on that head, and for no other purpose could the evidence be looked at.

Having come to a very decided opinion on this point, I need not go at all into the question as to the effect of the evidence if it could legitimately be received. At the same time I perhaps ought to state that the impression left on my mind by the evidence is far from satisfying me that the founders of this charity did really intend, in all circumstances and under all contingencies, to make themselves part of what is called the system of Methodism.

It appears from the Minutes of Conference of the year 1749 that at that time a question had arisen as to the proper mode of settling the chapels or preaching-houses which it was intended to appropriate to the Methodist body; and for the assistance of those who might desire to make any such settlement, a form of deed is given in the Minutes of Conference, whereby the object might be most conveniently obtained. The great probability is, that this form thus promulgated in 1749 would be known to those who framed

* 630 the deed of 1751, and this probability * is strengthened by the internal evidence arising on the face of the deed itself. For, comparing it with the form given in the Minutes of Conference, I find the two in many, indeed in most particulars, strikingly to correspond. But in the form contained in the minutes the power of appointing preachers was given eventually to the Conference, whereas in the deed of 1751 it is given to the trustees. To my mind this leads almost irresistibly to the inference that the framers of the deed of 1751, when they prepared it, had the Conference form before them, and followed it in most of its provisions, but that in the clause relating to the appointment of preachers after Mr. Wesley's death they intentionally deviated from it, giving the power to the trustees and not to the Conference. I am fortified in this opinion by what occurred thirty-one years afterwards, namely, in 1782, when new trustees were appointed. There had been originally nineteen trustees. In 1782 the number was reduced to ten, and they appointed nine new trustees. Mr. Wesley himself was a party to this deed, and the power of appointing preachers after his death is still reserved to the trustees as it had been previously, save only that certain other local officers of the Wesleyan body resident in the neighbourhood were associated with them. The fair inference from this is, that the intention of excluding the Conference, which had begun in 1751, remained in full force up to 1782. The alteration made by associating with the trustees the class-leaders of some neighbouring villages (whether valid or not we need not consider) certainly indicates an enduring intention to exclude the Conference, and so to deviate from the model form of settlement propounded in 1749.

These considerations lead me to believe that this Birstal society were indeed desirous of being members of the Methodist body, but that they would not consent to be so at the expense of putting out of their own hands the * power of appointing their preachers. If retaining that power they could be members of the Methodist body, they were ready and anxious to be so; but if by retaining such a power they were no longer Methodists, then they must cease to be so. The retention of that power was from the first made an essential part of the trust, and I see nothing warranting me in saying, even if that were a matter into which I could lawfully inquire, that the connection with Methodism was the paramount and the power of appointing these preachers a

secondary object, rather than that the latter was the primary, and the former the secondary object.

The result, therefore, is, that I am unable to concur in the view of this case taken by the Court below. The decree pronounced by the Vice-Chancellor declares that the chapel in question ought at all times to be used as a place of religious worship for the society at Birstal, of the people called Methodists, in accordance with their rules, and that, according to the true intent and meaning of the indenture of 1751, the preacher or minister therein directed to be appointed was intended to be at all times one of the preachers of the circuit of which Birstal might form part. From this declaration I feel bound to dissent, because I can discover nothing which entitles me to say that the chapel was necessarily to be used as a place of religious worship for the people called Methodists, if any of the rules of that body should be inconsistent with the deed of 1751, and I cannot hold it to be the true intent and meaning of that deed that the person to be appointed to preach and expound God's holy Word in the chapel (the expression preacher or minister used in the decree is not found in the deed) was necessarily to be at all times one of the preachers of the circuit of which Birstal might form part.

The decree then declares further that the trusts of the deed of 1751, with reference to the appointment of * a * 632 preacher by the trustees, cannot be carried into effect, and that the trust premises ought to be held by the trustees, on trust to permit the free use and enjoyment thereof by such persons, being preachers or ministers of the Birstal circuit, as shall have been duly appointed by the Conference for that purpose. My views, as I have already expressed, are inconsistent with this declaration.

These declarations comprise all the questions which were really in controversy between the parties. The decree goes on, it is true, to appoint new trustees in the place of some who had died and of others who had become disqualified under the deed of 1751, by removing to a distance of above twelve miles from Birstal; but for this purpose certainly no such information as the present was necessary. The only substantial object of the relators was to obtain a decree, establishing a right in the Conference to appoint the preachers. In that they have, according to my view of the case, failed; and I feel bound, therefore, to do what I think the Vice-Chancellor ought to have done, namely, to dismiss the information with costs.

Before I part with this case (I have not adverted to it in what I have written), I would say that my attention has been drawn to some observations which fell from me in the case of the *Attorney-General v. Hardy*, (a) as to what the Court would do in the case of appointing new trustees, and as to whether it would dismiss trustees who, although they had not misconducted themselves, had nevertheless shown themselves not to sympathize with the body for whom they were trustees. I extremely doubt whether I did not there go too far, what I said was merely an *obiter dictum*, and I wish not to let this case pass over without noticing it, so that if ever the question should arise, I may not have that dictum of mine quoted without having this also quoted at the same time, that I wish to withdraw it.

1854. December 13, 15. 1855. January 31. February 3. Before the Lord Chancellor Lord CRANWORTH, Mr. Justice WIGHTMAN, and Mr. Baron MARTIN.

A testator by his will bequeathed personal estate to J. W. upon trust for his the testator's wife absolutely, and in case his said wife should die in his lifetime he directed that all his said estate should be held by his said trustee upon certain trusts (which failed), and subject to those trusts he bequeathed all his property to J. W. absolutely: *Held*, that the gift to J. W. was dependent on the event of the testator surviving his wife, and that J. W. did not become entitled from the mere fact of the gift to the wife failing to have practical operation.²

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again. On the question being raised between the next of kin of the testator, and J. W., who claimed under the limitations of the will: *Held*, first, that the *onus* of proof that the husband was the survivor was upon J. W.; secondly, that it was requisite to produce positive evidence in order to enable the Court to pronounce in favour of the survivorship; and, thirdly, that no such evidence having been produced, the next of kin was entitled.

By the law of England the question of survivorship, in cases of the above

(a) 1 Sim. N. S. 338; see p. 357.

¹ S. C., 19 Beav. 459; another branch of the same case was *Wing v. Angrave*, 8 H. L. Cas. 283.

² See 1 Jarman Wills (3d Eng. ed.), 315; 2 *ib.* 704, 756; *Hannam v. Sims*, 2 De G. & J. 151.

description, is matter of evidence, and not of positive regulation and enactment as in the French Code; and in the absence of evidence there is no conclusion of law on the subject.¹

The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his title.

THIS was an appeal by the defendant William Wing, from a decree of the Master of the Rolls dated the 18th July, 1854, whereby his Honor declared the plaintiff to be entitled to the residue of the personal estates of John Underwood and Mary Ann his wife, the testator and testatrix in the cause. The following are the facts out of which the question between the parties arose.

On the 4th October, 1853, John Underwood and Mary Ann his wife, in contemplation and under the intention of going to sea on a voyage to Australia, duly made, signed, and published their respective last wills and testaments, both bearing date the 4th October, 1853, and containing mutual dispositions for the benefit of the survivor of them the said testator and testatrix.

* John Underwood, by his said will, disposed of his real * 634 and personal estate in the words and form following: "I direct that all my just debts, funeral and testamentary expenses, may be fully paid and satisfied. I give and devise all and singular my lands, tenements, and hereditaments, and real estate whatsoever and wheresoever, to which I am or any person or persons in trust for me is or are seised or entitled, and all and singular my goods, chattels, moneys, and securities for money, and all other

¹ *Wing v. Angrave*, 8 H. L. Cas. 183; *In re Phené's Trusts*, L. R. 5 Ch. Ap. 139, 145, 146; *In re Green's Settlement*, L. R. 1 Eq. 288. A similar case arose in Massachusetts, where a father seventy years of age, and his daughter thirty-three years old, being on board a steamboat that was lost at sea, both perished in the same calamity, and no special circumstances were known which tended to prove that one died before the other. The conclusion arrived at by the Court was that there was no legal presumption that either survived the other. *Coye v. Leach*, 8 Met. 371. See also *Barnett v. Tugwell*, 31 Beav. 232. Nor is there any presumption of law that both died at the same time. *Wing v. Angrave*, 8 H. L. Cas. 183; *post*, 660, 661. The *onus* of proving that the death of a person, presumed to be dead because he has not been heard of for seven years, took place at any particular time within the seven years lies upon the person who claims a right, to the establishment of which, that fact is essential. *In re Phené's Trusts*, L. R. 5 Ch. Ap. 139. See *In re Lewes's Trusts*, L. R. 11 Eq. 236.

my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, which I or any person or persons in trust for me or for my benefit shall be possessed of or interested in at the time of my decease, unto and to the use of William Wing, of No. 163, Bond Street, in the county of Middlesex, watch-maker, his heirs, executors, and administrators, according to the several natures and qualities thereof respectively, upon trust for my wife Mary Underwood, her heirs, executors, administrators, and assigns absolutely. And in case my wife shall die in my lifetime, then I direct that my said real and personal estate shall be held by my said trustee upon trust for such of them my three children, Catherine Underwood, Frederick Underwood, and Alfred Underwood, as being sons or a son shall attain the age of twenty-one years, and being a daughter shall attain that age or marry under that age, to be equally divided between or among them share and share alike. And in case all of them my said children shall die under the age of twenty-one years being sons, or under that age and unmarried being a daughter, then I give, devise, and bequeath all my real and personal estate as aforesaid unto and to the use of the said William Wing, his heirs, executors, administrators, and assigns, to and for his and their own absolute (a) and benefit." And the

* 635 said testator appointed * his said wife and the said defendant William Wing executrix and executor of his said will.

Mary Ann Underwood (called in her husband's will Mary Underwood) by her will, after referring to certain powers in that behalf conferred upon her by the will of her late father, John Tulley, disposed of the property which she was thereby empowered to appoint, in the words and form following: "Now, in exercise of the power so given or reserved to me as aforesaid and of every other power or authority in any wise enabling me in this behalf, I do hereby devise, bequeath, and appoint all the said hereditaments and premises, and sum and sums of money, and all other the real and personal estate devised or bequeathed to or in trust for me by the said will of my said father, John Tulley, deceased, and all my estate and interest whatsoever under the said will, and all arrears of the said income, dividends, and annual proceeds that may be due to me at the time of my death, unto and to the use of my husband, John Underwood, his heirs, executors, administrators, and

(a) *Sic in orig.*

assigns, according to the natures and qualities thereof respectively (subject to the estates and interests of my children therein, under or by virtue of the will of the said John Tulley, deceased). And in case my said husband should die in my lifetime, then I devise, bequeath, and appoint the said hereditaments and premises, and sum and sums of money, and arrears of income aforesaid, unto and to the use of William Wing, of No. 163, Bond Street, in the county of Middlesex, watch-maker, his heirs, executors, administrators, and assigns, to and for his and their own absolute use and benefit. And I do hereby nominate and appoint my said husband and the said William Wing executors of this my will."

On the 12th October, 1853, Mr. and Mrs. Underwood *and their three children, Catherine, Frederick, and Alfred, * 636 embarked together on board the ship *Dalhousie*, then lying in the river Thames, and bound on a voyage from the port of London to Sydney, and on the same day the ship put to sea in prosecution of her voyage. On the morning of the 19th October, the ship was wrecked and lost in the British Channel off Beachy Head, and Mr. and Mrs. Underwood with their children, and every person on board except one sailor, Joseph Reed, were drowned. It appeared, however, that one of the children, Catherine, survived her parents and brothers for a short time, being seen alive for several minutes after they had sunk.

The defendant, W. Wing, who was no relation but only an intimate friend of the family, duly proved the will of Mr. Underwood on the 8th November, 1853, and the will of Mrs. Underwood on the 15th December, 1853.

On the 7th January, 1854, letters of administration of the goods of Catherine Underwood were granted to the plaintiff, Elizabeth Girdler Underwood, who was the mother of Mr. Underwood; and on the 19th January, 1854, she filed the bill in the present suit, praying an account of the personal estate of John Underwood, and of the separate personal estate of Mary Ann Underwood, (a)

(a) The bill stated Mary Ann Underwood to be possessed of other property besides what she was empowered to dispose of by will, and treated the defendant W. Wing as her general personal representative by virtue of the probate obtained by him of her will. This, however, was not the case, for the probate had not the effect attributed to it, and, as the defendant W. Wing had obtained no grant of administration *cæterorum*, the plaintiff had no ground for asking an account of the general personal estate of Mary Ann Underwood. The mistake

* 637 and that the rights of the plaintiff, as administratrix * of Catherine Underwood, in the residue of the personal estate of John Underwood and in the said personal estate of Mary Ann Underwood might be ascertained and declared. The bill alleged that the deaths of John Underwood, Mary Ann Underwood, Frederick Underwood, and Alfred Underwood took place at the same moment of time, and were proximately occasioned by the shock of a large wave or surge which broke violently over that part of the ship where they were all standing clasped together, and then and there so sunk or submerged them while in that position that not one of them again rose to the surface of the sea or reappeared alive, and the last-mentioned four persons in fact perished simultaneously by the force of instantaneous submersion in the sea on the 19th day of October, 1853; that under the circumstances aforesaid neither of them the said John Underwood and Mary Ann his wife survived the other of them; that the said Catherine Underwood survived her parents and brothers, and thereby became the sole next of kin of her father and of her mother. The bill charged that the limitations and bequests in the will of John Underwood contained for the benefit of William Wing were wholly contingent and dependent upon the event (which did not happen) of Mary Ann Underwood dying in the lifetime of him, John Underwood, and that under the circumstances the clear residue of John Underwood's personal estate, after payment of his debts and funeral and testamentary expenses, pertained to the estate of Catherine Underwood as his sole next of kin surviving him; and also charged that the appointments and bequests in the will of Mary Ann Underwood contained for the benefit of William Wing were, in like manner, wholly contingent and dependent upon the event (which did not happen) of John Underwood dying in the lifetime of his

* 638 wife Mary Ann * Underwood; that in the events which actually happened, the beneficial right to her separate estate did not ever vest in William Wing under or by virtue of the wills of John Underwood and Mary Ann his wife, or either of them; and that such separate estate then properly pertained to the personal estate of Catherine Underwood, as sole surviving next of kin of the said Mary Ann Underwood.

was not, however, adverted to in the earlier stages of the suit, but was noticed on the appeal, when, by consent, so much of the bill as related to her estate was dismissed.

In addition to the facts above stated, it may be mentioned that Mr. Underwood was of the age of forty-three years at the time of his death, and Mrs. Underwood of the age of forty years; that they were married in 1834; and that the only issue consisted of the three children before named: Catherine born in 1835, Frederick in 1838, and Alfred in 1840, all of whom died infants and unmarried.

W. Wing, the defendant, filed his answer on the 18th February, 1854, claiming to be entitled under the wills: he neither admitted nor denied the survivorship of Catherine, but, in reference to the deaths of Mr. and Mrs. Underwood and the two sons, stated that Mr. Underwood was in good health, a very strong and powerful man and a very able swimmer, that Mrs. Underwood was in delicate health and weakly state of body, and that the two sons were of tender age. The defendant submitted, as a conclusion from these facts, that the four did not simultaneously perish, but that, though they perished immediately after they were swept from the ship into the sea, Mr. Underwood was enabled to preserve his life for some considerable period, and that the presumption of survivorship was in his favour.

Both parties went into evidence upon the questions * thus * 639 raised; the following statement contains all that it is material particularly to notice:—

Joseph Reed, the only survivor of those who were on board the vessel, was examined as a witness for the plaintiff; he gave the following account: “I shipped on board the *Dalhousie* last October; the ship sailed the 18th day of October from the East India Docks bound to Sydney; the crew consisted of thirty-two Lascars and three able seamen and an assistant; there were four mates and the captain; she carried passengers; there was a family of Simpsons and a family of Underwoods. The Underwood family consisted of five, namely, two boys, a young lady, and the father and mother: I don't know in what part of the ship the family of the Underwoods were. The ship got about sixteen miles to the southward and westward of Beachy Head; we sighted Beachy Head on the 18th; I remember the morning of the 19th, the ship foundered on that morning; a little after four o'clock in the morning of the 19th, the ship was lurching very heavily; she kept afloat till about half-past five or six o'clock; she went over on her starboard beam ends; she did not go down at

once ; she kept in that position, namely, on her beam ends, half an hour ; the weather was very squally, a double-reef-top-sail breeze ; the sea was very rough, very sharp. While the ship was lying on her beam ends the sea made a clear breach right over her ; when the ship went over on to her beam ends I was at the wheel ; I was obliged to leave the wheel when the water came up to my knees ; when I left the wheel I hauled myself over on the weather quarter, that was then the port quarter ; from where I was I could see what the other people on the ship were doing. Four of the Underwood family were drawn out of the port quarter-gallery while I

was on the weather quarter ; I helped to draw them out
* 640 myself ; the four were the two boys, * Mrs. and Mr. Underwood ; I don't believe they were there more than three minutes at the outside. As I was helping to clear away one of the boats I heard a scream, and looked round, and saw Mrs. Underwood grabbing for or trying to lay hold of one of her boys ; I saw her take hold of him while they were both on the side of the vessel. The mother was with the two boys ; the father was close to them by the ship's rail, a good two steps off from them ; the next I saw was they were all together ; the husband had his wife in his arms, and the two boys were holding on to the mother ; they were all clasped together. I don't believe it was a minute before a sea came and swept them all off ; they seemed to go off all at once ; I don't think they were separated ; I saw no more of them ; the sea swept them right off ; none of them ever came in sight again that I saw ; I did not see Mr. Underwood again. The daughter was not with them at that time ; she was picked up from the forward part of the poop abreast of the main rigging ; I saw the daughter alive after the others went down. It was after her father, mother, and the two boys had gone down that Captain Butterworth sung out, ' For God's sake look here ! ' I went and looked ; I saw a young lady struggling in the water ; the young lady was Miss Underwood ; I said, ' Let us try and save her ; ' I said that to my ship-mates standing round ; I got hold of the main-top-mast-back-stay, and put one of my legs over the top-gallant-bulwark ; I then caught her under her arm with my right hand, and with the assistance of James Burley we got her out on to the side of the vessel ; when we got her there she knelt over the spar, and seemed to be in the act of prayer ; she might have remained in that state five minutes ; then I went back to the boat with James

Burley, and, with the assistance of some Lascars, tried to get the boat off; we told the Lascars to hold on to the head of the boat, while I and Burley lifted her stern round on to the quarter-gallery; we wanted to launch her so as to save some * 641 lives. While in the act of lifting her stern round, the Lascars got frightened, and let go the head of the boat, and the boat went down and was swamped. After the boat went down, I proposed to Burley to cut away the spare main-yard which was lashed on the ship's weather quarter as the only chance of saving any of us; then Captain Butterworth came there, and said, 'If you are going with that spar you had better get something to lash yourselves to it with:' Burley said he hadn't got a knife, he was there: I pulled out my knife, and cut a piece of the mizzen-top-gallant-clew-line, and I looked round and saw the captain; I gave him a piece of my rope, and kept the remainder for myself; but seeing this young lady, Miss Underwood, was in a distressed state, I went to her and asked her if she thought I hadn't better lash her to the spar, as I and some of my shipmates thought of going on it; she said she would be much obliged to me, and I lashed her to the spar; I did so with the rope I had meant for myself: when I had done that she said, 'May God bless you and get you safe to land.' While I was lashing her to the spar I told her I didn't know she would be saved, but there was a chance of her being picked up, and having a decent burial. The captain lashed himself to the same spar that I had lashed the young lady to; I went and cut away the forward lashing first, and then I went and cut the after one, and got it partly cut when the knife broke; I got another knife from the captain, and finished cutting the lashing. Just as I had cut the lashing there was a heavy sea broke over and swept the spar off clear of the wreck, I mean the spar to which the young lady and captain were lashed; two or three other persons hung on the same spar: the young lady was alive when the spar was washed off the ship. I observed Miss Underwood after the spar had gone away; she was alive at that time; * I saw the spar ten minutes after the ship had gone down; * 642 at the end of that ten minutes I was on the boat's chock; the ship was afloat about ten minutes after the spar had got clear; the spar was seen by me for nearly twenty minutes after it had got clear, but in such a state of excitement a man could not judge very well of time. Miss Underwood was on the spar the last time

I saw it; I could not tell whether she was alive or dead; her head was hanging over on her shoulder. I have no further knowledge what became of Miss Underwood; she was alive when the spar was clear of the ship; that was after Mr. and Mrs. Underwood had been swept off. Miss Underwood was the last of the Underwoods I saw alive. When the father and mother and two boys were swept off the ship, my opinion is that they were swept into the whirlpool made by the heave of the ship's counter; that must have taken them down; I think no swimmer could have struggled against that, so as to come up again. Mrs. Underwood was in her night-dress when she was hauled out of the quarter-gallery, and was so until she was swept away. Mr. Underwood had a coat on; it was a kind of pepper-and-salt shooting or morning-coat; he had trousers on, but no shoes; the boys were in their night-clothes. There were little pieces of wood in the water when the father, mother, and boys were washed off, but there was no timber, nothing of any bulk or size, in the water in that part. It was while Mr. and Mrs. Underwood and the boys were clasped together, as I have before described, that they were washed over; they were clasped together in this manner: the boys had hold of the mother, and the father had his arms round them all, and they were in that state when the sea swept over the vessel; that was the last I saw of them. Miss Underwood was in her night-dress; she had no shoes on. At the time Mr. and Mrs. Underwood were washed away, they did not seem to be exerting themselves; * 643 they seemed resigned * to their fate. All this happened on the morning of the 19th; the ship went down on that morning, and has never since been heard of. I was the last to leave her, and am the only survivor."

Two medical witnesses, Henry Randall Wotton and Henry Hancock, were also examined on the part of the plaintiff: that portion of the evidence of Joseph Reed which detailed the circumstances under which Mr. and Mrs. Underwood and the two boys went down was read over to them.

Mr. Wotton explained the process of asphyxia or drowning in the case of a person submerged in water, stating his opinion to be that, assuming the four persons in question to have been in a continued state of submersion, death would take place in the case of all in two minutes at the outside. He further stated, that if two persons, both in health, were totally submerged together at the

same time, asphyxia would ensue in the case of each of them at the same instant, as nearly as he could conceive ; that a person of seventy would live as long in such circumstances as a person of thirty, assuming them both to be in health, and a female as long as a male person, and a strong man as long as a weak one. After mentioning circumstances under which a good swimmer might be expected to live longer than a person who was not a swimmer, he repeated that, after hearing the evidence of Joseph Reed, he could not, speaking medically or physiologically, give any opinion which was the survivor, whether Mr. or Mrs. Underwood. He also said that he should not call asphyxia death ; it was possible that, after asphyxia had taken place, some of the vital functions might continue for two minutes, and that they would not continue longer in the case of a strong man than in the case of a weak man, nor in the case of a man than in that of a woman.

* Mr. Hancock agreed in the general view of the subject * 644 taken by Mr. Wotton, and said, that, assuming four persons in the condition of Mr. and Mrs. Underwood and their two boys to be swept into the water together, he was not able to give an opinion which of the four was the survivor ; that he did not think it would be possible for any person to give a positive opinion on the subject, he meant an opinion of any value : he said that he stated that from physiological, as well as from other views of the subject.

On the part of the defendant, Dr. Alfred Swaine Taylor and two other medical men were examined. Dr. Taylor stated that, according to his experience in cases of asphyxia, a male, *cæteris paribus*, resisted the asphyxiating cause more than a female, and would survive a female exposed to the same asphyxiating influence at the same time ; that, in the case of simultaneous submersion in the water of a man and woman, the consciousness on the part of the man of a power to swim would operate in his favour ; that in the case of two persons, neither of whom could swim, the stronger would have the advantage, especially if he had a capacious chest ; that, assuming two persons of equal strength to be submerged in the water at the same moment, and to undergo total and uninterrupted submersion, he did not believe they would die at precisely the same instant of time ; that asphyxia might possibly supervene at the same instant of time, but asphyxia was not death ; that the length of time between asphyxia supervening and death

ensuing would depend on the physical strength of the party, varying according to age and sex, and the healthy or unhealthy state of the body; that, *cæteris paribus*, that time would be longer in the case of a male of forty-three than in a female aged forty, his reasons for that opinion being, that in the male there was a greater power of life, a greater power of resisting the causes of death. After hearing * J. Reed's evidence read, he said:

"I should take the medical presumption to be, that the father survived the wife and two boys. That presumption would be increased if it were established that the father was a good swimmer; and if it were proved that the wife was in a sickly state of health, I think that would lead to her sinking without exertion."

The two other medical witnesses, Mr. Brinton and Mr. Paget, having heard the evidence given by Dr. Taylor, stated their full concurrence in the opinion expressed by him as to the presumption of survivorship in the hypothetical cases which had been submitted to him, and also in the opinion expressed by him as to Mr. Underwood having survived Mrs. Underwood and their two boys.

The other witnesses produced by the defendant spoke to the state of health and general habits of Mr. and Mrs. Underwood, showing the former to be a robust, healthy man and a good swimmer, and the latter to have been in a weak state of health at the time of the catastrophe.

The case came on to be heard before the Master of the Rolls in July, 1854, when his Honor expressed his opinion to be, that he must consider that there was no evidence whatever to show whether Mr. or Mrs. Underwood was the survivor, and that the conclusion of law was, that they must be treated as having both died at the same moment. His Honor in concluding his judgment said, "The result is, notwithstanding what *Mr. Roupell* urges in the argument on the construction of the will, I think the contingency has not arisen on which the estate was to go, and I must make a decree accordingly." The decree, drawn up in pursuance of this decision, declared that in the events which had happened

John Underwood deceased, the testator, and Mary Ann his wife, the testatrix, respectively died intestate as to the whole residue of their respective personal estates bequeathed and appointed by their wills respectively, and that the plaintiff as the

administratrix of Catherine Underwood, who was the only surviving child and sole next of kin of the said testator and testatrix at the time of their respective deaths, was entitled to all such residue of their respective personal estates.

From this decree the defendant appealed, and, on the nature of the case being stated in the first instance to the Lords Justices, and then, by their Lordships' direction, to the Lord Chancellor, the Lord Chancellor ordered it to be heard before himself, with the aid of two common-law Judges; and the case now came on to be heard accordingly.

Mr. R. Palmer and *Mr. Harris Prendergast*, for the plaintiff, supported the decree appealed from. — The plaintiff in this case represents Catherine Underwood, who, upon the evidence, unquestionably survived for several minutes beyond that point of time when her parents, Mr. and Mrs. Underwood, are proved to have been washed overboard and finally submerged in the sea; and Catherine Underwood filled the character of next of kin of both her deceased parents. By the law of England the succession to personal property is carried by the Statute of Distributions to the next of kin in the same way as the common law carries real estate to the heir; and such title must therefore prevail, unless it be displaced by an operative will; the legatee is bound to establish his claim against the next of kin. Where then a residuary bequest is, as in the present instance, conditional, the legatee must, as against the next of kin, prove the act or event to have taken place on which the condition rests; he must show the fulfilment of the condition. Here the condition of the residuary bequest to Mr. Wing * was that the primary legatee should die in the * 647 lifetime of the testator; the words of the wills are explicit in this respect; and the *onus* is on Mr. Wing, setting up a bequest in opposition to the title of the next of kin, to show which of the two, Mr. and Mrs. Underwood, survived the other: *Mason v. Mason*; (a) but this he cannot do, for demonstration is under the circumstances impossible. By the Code Napoleon and the Civil Law several absolute rules of presumption are prescribed for cases of the present description; (b) but, as Sir W. GRANT says

(a) 1 Mer. 308.

(b) See 1 Mer. p. 310, note. It was, however, mentioned that the case of Mr. and Mrs. Underwood would not really fall within these rules, the difference

in the case just cited, the law of England does not adopt from foreign codes any presumptions of fact. The law of England contains no general rules of presumption of survivorship applying to cases like the present; each case is referred to its own special circumstances and evidence. *Broughton v. Randall.* (a) Here the evidence is that at a given moment the four Underwoods, the father and mother and two sons, were swept simultaneously into a whirlpool in a raging sea, and were drowned; beyond this there is nothing shown on which a judicial conclusion can be based. In the absence, therefore, of evidence, the defendant's claim to the beneficial succession under the wills of Mr. and Mrs. Underwood must fail, and there will be a resulting trust for the next of kin. No argument can in this case legitimately be drawn in favour of survivorship from the possession of physical advantages of age, sex, temperament, or constitution; from the moment when the four persons in question were simultaneously swept into the sea and disappeared from sight all is necessarily conjecture; and this is too

infirm a foundation for a decision which would deprive the
 * 648 plaintiff of a *prima facie* legal title. Physiological * doc-

trines are notoriously uncertain bases of reasoning; the conditions or ingredients of experiments in vital physiology are never fully known; and, besides their own inherent uncertainty, no physiological experiments on organized bodies are repeated under precisely the same conditions. Scientific evidence on such subjects is, therefore, necessarily imperfect; the influences of cold, hunger, surprise, and fear, and the moral and religious influences which operate on the mind in great calamities, cannot be measured; nor can the proportions of such influences on different ages, sexes, and characters be defined. All preconceived notions of the superiority of the chances of one over another of persons under circumstances like those now in question, founded on capacity for swimming, vigour of constitution, and the like, are continually falsified by the results of similar calamities of which the circumstances have been ascertained. Without denying the benefit of such advantages, it is found that the most helpless are frequently saved, while the most able-bodied and the possessors of superior advantages for self-preservation perish first. The Ecclesiastical

of their ages being three years; and that it would be tried, even under the French law, "*par les circonstances.*"

(a) Cro. Eliz. 502.

Courts are familiar with cases of the present description, and in dealing with them follow the only sound rule of reasoning, by holding that where no survivorship is proved as between parties having mutual rights of succession, neither of the parties transmitted a succession to the other, and they pronounce decrees as if the parties had died simultaneously. *Taylor v. Diplock*, (a) *In the Goods of H. Selwyn*, (b) *In the Goods of R. Murray*, (c) *Satterthwaite v. Powell*. (d) They do not pronounce that A. and B. did actually expire at the same moment of time, that being in fact the least probable of the three contingencies described by Sir W. GRANT in his judgment in *Mason v. * Mason*, but * 649 without resorting to any physiological conclusion, and in the absence of satisfactory evidence to the contrary, they deliver their sentence as if the deaths of A. and B. had been simultaneous. Thus in *Satterthwaite v. Powell*, the Judge, while pronouncing for the simultaneous death of a husband and wife, admitted the probability of the husband being the survivor, but nevertheless did not feel at liberty to treat such probability as a basis of legal adjudication in opposition to *prima facie* legal rights; and in *Mason v. Mason*, when Sir W. GRANT was granting an issue, he said that in order to prove survivorship demonstration was necessary, but was impossible. In the present case demonstration is impossible as to whether Mr. Underwood or his wife survived after submersion, and this Court must therefore declare an intestacy of the beneficial interest in the property of John Underwood.

They also mentioned, in the course of their argument, *The King v. Dr. Hay (General Stanwix's Case)*, (e) and Mr. Fearne's argument upon it (Fearne's Posth. Works, p. 38), cases of *Wright v. Netherwood*, (g) *Bradshaw v. Toulmin*, (h) *Hitchcock v. Beardsley*, (i) and *Doe v. Nepean*; (k) and they distinguished the present case from that of *Sillick v. Booth*, (l) which had been relied upon by the defendant before the Master of the Rolls.

(a) 2 Phillimore, 261.

(d) 1 Curteis, 705.

(b) 3 Haggard, 748.

(e) 1 W. Black. 640.

(c) 1 Curteis, 596.

(g) 2 Salk. 593 note (Evans's ed.); S. C. (more fully reported), 2 Phillimore, 266, note.

(h) 2 Dick. 633.

(k) 5 B. & Ad. 86.

(i) West's Reports, 445.

(l) 1 Y. & C. C. C. 117.

They adverted to the possibility of an argument being raised in favour of the defendant upon the construction of the wills in question, reserving, however, any particular notice of it that might be necessary for the reply.

* 650 * *Mr. Roupell* and *Mr. Baggallay*, for the defendant W.

Wing, supported the appeal. — Two points are involved in this case: the appellant submits, first, that, assuming the judgment of the Master of the Rolls to be correct, still, on the true construction of these wills, he is entitled; and, secondly, that the evidence does not warrant the conclusion of the simultaneous death of Mr. and Mrs. Underwood.

On the first point we submit that the construction of Mr. Underwood's will necessarily assumed by the plaintiff is not the true construction, and for the purpose of argument it is not material which will is taken, as the construction of both must be determined on the same principle. The defendant insists that it is obvious that the testator did not mean to die intestate, and that his intention, as shown by his will, was, first, that his wife should have all his property to dispose of as she thought fit if she survived, and, secondly, in the event of her not succeeding to the property, that his three children should have it, and, in the event of their not succeeding to the enjoyment of it, or dying before they were in the condition or of capacity to properly dispose of it, that it should absolutely belong to the defendant. We submit that the bequests were alternative bequests, namely, to his wife if she lived to take, but if she did not live, then to his children, and if they did not take, then to the defendant; that his clear intention was that one or other of these bequests should take effect, that one or other of these objects of his bounty should have his property, and that in no event should he die intestate, as was proved by the limited interest which he bequeathed to his children who were his next of kin. We contend that the whole context of the will showed that

the words "in case my wife shall die in my lifetime" were
* 651 not meant to be a strict condition, but merely * to show

how he desired his property to be disposed of, in the event of his wife not becoming entitled to it. The rule to be deduced from the decided cases is, that conditional words, unless it can be shown that they are intended to mean more than a series of limi-

tations, are to be construed in favour of the ultimate gift when the preceding gifts are out of the way: there must be something in the will to prohibit the more liberal construction, before a limitation can be read as a strict condition. *Jones v. Westcomb*, (a) *Avelyn v. Ward*, (b) *Meadows v. Parry*, (c) *Murray v. Jones*, (d) *Statham v. Bell*, (e) *Bradford v. Foley*, (g) *Parry v. Boodle*, (h) *Pearsall v. Simpson*, (i) *Mackinnon v. Sewell*, (k) *Wilson v. Mount*, (l) *Lenox v. Lenox*. (m)

On the second point, we submit that the question, whether Mr. or Mrs. Underwood was the survivor, is one of evidence, and that the *onus* of proof rests on the plaintiff. If, however, the *onus* is on the defendant, we contend that enough has been proved in this case to lead the mind of the Court to a judicial conclusion that the husband was the survivor. It is not necessary to carry the case higher than this, for the Court is in the constant habit of acting on presumption: *Pickering v. Lord Stamford*, (n) *Fenner v. Agutter*; (o) and the decision in *Sillick v. Booth* (p) is an actual instance of the Court having acted on the same kind of evidence as that which * is now relied on. Looking at the * 652 condition of the two persons, Mr. Underwood and his wife, the former a strong and healthy man and a good swimmer, and the latter in delicate health, the conclusion is almost unavoidable that the husband must have been the survivor.

Mr. R. Palmer replied.—He contended that the estates limited by Mr. Underwood's will to the children and to the defendant, were strictly upon the condition that Mrs. Underwood should die in the testator's lifetime; that it was incumbent on the defendant to show that she did so die; that he had failed to do this, and was not therefore entitled. The same line of argument applied to the will of Mrs. Underwood. He commented on the cases referred to on the other side, and cited *Doo v. Brabant*, (q) *Cal-*

(a) *Préc. Ch.* 316; *S. C.*, 1 *Eq. Ca. Abr.* 245.

(b) 1 *Ves* 420.

(c) 1 *V. & B.* 124.

(d) 2 *V. & B.* 313.

(e) *Cowper*, 40.

(g) 1 *Douglas*, 63.

(h) 1 *Cox*, 183.

(i) 15 *Ves.* 29.

(k) 5 *Sim.* 78; 2 *Myl. & K.* 202.

(l) 2 *Beav.* 397.

(m) 10 *Sim.* 400.

(n) 2 *Ves. Jr.* 272; see pp. 280, 281.

(o) 1 *Myl. & K.* 120.

(p) 1 *Y. & C. C. C.* 121.

(q) 3 *Bro. C. C.* 393.

thorpe v. Gough, (a) *Andree v. Ward*, (b) *Lee v. Busk*, (c) and *Jarman on Wills*, Vol. I. p. 733, &c., Vol. II. p. 702, &c.

[The Lord Chancellor mentioned *Phipps v. Ackers*. (d)]

1855. January 31.

Mr. Justice WIGHTMAN read the following, as the joint opinion of Mr. Baron MARTIN and himself on those parts of the case on which the Lord Chancellor had requested their assistance.

This is an appeal against a decree of the Master of the Rolls, pronounced on the 18th July last. The bill was * 653 * filed by the plaintiff, as administratrix of Catherine Underwood, under the following circumstances :—

John Underwood, the father of Catherine Underwood, by his will, dated the 4th October, 1853, devised all his property, real and personal, to the defendant John Wing, his heirs, executors, and administrators, according to its respective nature and quality, upon trust for his wife Mary Underwood, her heirs, executors, administrators, and assigns absolutely, and in case his said wife should die in his lifetime, he directed that all his said estate should be held by his said trustee upon trust for such of his three children Catherine, Frederick, and Alfred, as being sons should attain twenty-one or being a daughter should attain that age or marry, and in case all should die under that age, and the daughter be unmarried, he devised all his property to the defendant, his heirs, executors, administrators, and assigns for his and their absolute benefit, and he appointed his wife and the defendant his executors.

Mrs. Underwood by her will, dated the same day, after referring to certain powers conferred upon her by the will of her father, disposed of the property which she was thereby empowered to appoint in substance as follows ; namely, she devised and appointed all her property whatsoever, and all arrears which might be due at the time of her death to her husband, his heirs, executors, administrators, and assigns (but subject to the estate and interest of her children under the will of her father), and in case her husband should die in her lifetime she devised and appointed all her said property to the defendant, his heirs, executors, administrators, and

(a) 3 Bro. C. C. 395, n.

(c) 2 De G., M. & G. 810.

(b) 1 Russ. 260.

(d) 3 Cl. & Fin. 702, and 9 Cl. & Fin. 583.

assigns, for his and their absolute use and benefit, and appointed him and her husband her executors.

* About a week after these wills were executed, Mr. and * 654 Mrs. Underwood and their three children (they being their only children) embarked on board a ship called "The Dalhousie," bound for Sydney in Australia, and on the 19th October the ship was totally lost, and they were all drowned; one man alone escaped from the wreck, a seaman named Joseph Reed, who was examined in the cause, and gave a very clear and distinct account of the circumstances of their deaths. His evidence is, that upon the morning of the 19th October the ship foundered, and after some little time went upon her starboard beam-ends; that the sea, which was very rough, then made a clear breach over her; that whilst the ship was in this state, Mr. and Mrs. Underwood and the two boys were drawn out of one of the ports of the ship; that when he last saw them, which was a very few minutes after they were brought out, they were all standing together on the side of the ship, the husband with his wife in his arms, and the two boys clinging to their mother, all clasped together; that whilst in this position a sea swept them right off, and he saw them no more, and his belief was that they all four went down together, instantly, in a whirlpool or eddy caused by the beating of the sea against the ship, and never rose again. He then described the manner of the death of the daughter Catherine, whom he assisted to lash to a spar in hope of saving her life; and it is certain that she survived her father and mother and brothers for some little time, probably about half an hour.

In the following month of November, the defendant proved, and obtained probate of, both wills; and in January, 1854, the plaintiff obtained letters of administration to the daughter Catherine, and filed the present bill, insisting that, under the circumstances which existed, both Mr. and Mrs. Underwood had died intestate as to the * beneficial interest in their property, * 655 and that it vested in the daughter Catherine, not under the wills, but as next of kin; and she claimed as her administratrix. Two medical gentlemen were examined on behalf of the plaintiff, who gave as their opinion that the husband and wife died at one and the same time; three were examined on behalf of the defendant, who gave as their opinion that the husband survived the

wife ; and they gave various reasons in support of their respective opinions.

It was insisted on behalf of the plaintiff that, under both wills, the estates or interests given to the children and the defendant were conditional, in the case of the husband's will, "on condition that his wife should die in his lifetime," in the case of the wife's will, "on condition that her husband should die in her lifetime;" that there was no evidence, or at all events none which a legal tribunal sitting judicially could act upon, as to which died first; and that, it being therefore impossible to prove the condition precedent, the estates or interests could never vest, the *onus probandi* being on the defendant claiming against the next of kin.

On behalf of the defendant it was contended, first, that the correct conclusion from the evidence was, that Mr. Underwood survived his wife, and, secondly, whether this was so or not, that under the peculiar circumstances of this case the *onus* of proof was not upon the defendant; and, from the conclusion of the judgment of the Master of the Rolls, it appears that it was also made a point before him, that, upon the true construction of the wills, the defendant was entitled to the property devised, notwithstanding that it might be impossible to ascertain whether Mr. or Mrs. Underwood was the survivor.

It is, however, obvious, as well from the report of the * 656 * arguments as of the judgment, that the point of the survivorship was the one mainly pressed. All the cases and authorities upon the subject seem to have been cited, and the result which the Master of the Rolls arrived at was, that there was no evidence to show who was the survivor; and he made a decree in favour of the plaintiff.

There has been an appeal from this decree, and it has been argued before us. Three points have been made on behalf of the defendant: the first, that the just and legitimate conclusion to be drawn from the evidence in the cause is, that Mr. Underwood survived his wife, and that therefore the condition contained in his will has been performed; the second was, that, under the circumstances of the case, the *onus* of proof of the survivorship was upon the plaintiff, and not upon the defendant; and the third was, on the construction of the wills. It was with reference to the first and second of these questions only that our assistance was re-

quested by your Lordship, and it is with respect to them only that we propose to give our opinions.

As to one of these points, namely, the *onus* of proof, we think the defendant clearly fails. The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his entire title. In the absence of any effectual disposition of the beneficial interest in personalty, the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title, and to rebut the *prima facie* case of the next of kin. The *onus* of proof is therefore upon the defendant.

As to the point of survivorship, it was argued with great ability, and the same cases and authorities were cited before us as before the Master of the Rolls. In * the French Code the * 657 rule of survivorship is made a matter of positive regulation and enactment, varying according to the ages and sex of the persons dying in the same shipwreck; but in our law it is not so. The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as any other fact. If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide, independent of age or sex; and if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and of consequence no judgment can be formed. Upon this point we concur with the Master of the Rolls; we think there is no evidence to show whether the husband or wife was the survivor: there may be surmise, and speculation, and guess, but we think there is no evidence. We have no doubt that the scientific gentlemen who were examined were perfectly sincere in their opinions, but it is obvious that their evidence was given, having reference to the case of two persons quietly submerged in water and remaining there until drowned, or to the case of two persons, one being a swimmer and the other not, and both thrown suddenly into the water unencumbered and acting upon their instincts. The present case is of two persons clasped together, two boys clinging to one of them, standing pretty high out of the water upon a ship's side, swept off together by an overwhelming wave into a raging sea, and one or other or both of whom may have been stunned by the violence of the blow from the wave, may have struck against a timber of the

ship, and may, in point of fact, have been dead before he or she reached the water at all. How is it possible, under such circumstances, for any tribunal, sitting judicially, to say which of these two individuals died first? We may guess or imagine or
 • 658 fancy, but the law of England requires evidence, * and we are of opinion there is no evidence upon which we can give a judicial opinion that either survived the other.

The Master of the Rolls is represented in the report of his judgment to have said, "There is therefore no evidence to show who was the survivor, and the conclusion of law is, that both died at the same moment." According to our view this is not correct; we think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor.

Our opinion, therefore, upon the two questions in respect to which it is requested, is in favour of the plaintiff.

February 3.

THE LORD CHANCELLOR. — The main part of this case I consider to have been substantially disposed of the other day; the facts lie in a narrow compass, and I will now shortly advert to them. [His Lordship here recapitulated the main facts of the case as above given.] The question which arises under the will of the husband, there is a similar question under the will of the wife, is this, whether the plaintiff, the personal representative of the daughter who is admitted to have survived her parents and brothers, is entitled to the residuary personal estate as against the defendant who claims under the will; I am now dealing with the case as on the will of the husband alone.

I follow very much the line of reasoning that was adopted by the learned Judges: where a person dies seised in fee of real estate, *primâ facie* his heir-at-law is entitled to succeed,
 • 659 and he can only be deprived of that * right by some devisee coming forward and showing that a will valid in point of form and effectual in point of substance was made displacing his rights. I am perfectly persuaded that exactly the same principle is applicable to the case of personal estate: if a person dies possessed of personal estate, *primâ facie* the next of kin will be entitled to it, and their right will only be displaced by some person

coming forward and showing a valid and effectual disposition taking it away from them.

The question in the present case is whether, the plaintiff being the next of kin or representing the next of kin, Mr. Wing shows a title depriving her of that to which, in the absence of a valid will, she is entitled. That depends first of all on the terms of the will, and the will gives the property to Mr. Wing "in case my wife shall die in my lifetime." Then comes the question, on whom does the burden of proof rest to show whether the wife did or did not die in the testator's lifetime? I think, the principle once being admitted that the *prima facie* title is in the next of kin, that it must rest on the person who claims the property under a bequest giving it to him in that particular event. It is not for the next of kin to show that the wife did not die in her husband's lifetime; but the person who claims under the disposition must show, not that probably it might be one way or the other, but that that state of circumstances did in fact occur which entitles him according to the language of the will to say that the wife did die in her husband's lifetime.

Then arises the question of fact, has the defendant shown that the wife did not survive? I entirely concur in what was said by the learned Judges on that subject, that there is no evidence whatever which would justify any one in coming to such a conclusion, because in this case, as in all others where a person has to show that a * particular state of things has arisen, the evi- * 660 dence must be positive, and it is not sufficient to show a variety of circumstances from which it may be very difficult to form an opinion one way or the other. I think it impossible to carry this evidence before us to any thing like proof as to whether Mr. or Mrs. Underwood was the survivor. I give the medical gentlemen entire credit for speaking scientifically, and as they believe quite accurately (though I do not think that they themselves are very confident on the subject); but to take what they say, calculating and reasoning *a priori*, for that is all it comes to, as to which of two people may have breathed a few seconds the longer at the bottom of the sea, as establishing the fact, seems to me to be quite misunderstanding the nature of human testimony. The medical men may be quite right in the observations they have made of persons dying from asphyxia; but I confess that, from the perusal of the evidence, I am utterly unconvinced that they can

tell us which of these two persons died first, even supposing them to have been taken and quietly submerged to the bottom of the sea. When, however, it is remembered that they were violently thrown by one blow from the side of the ship into the sea, any conclusion which can be acted on, founded on the supposition being correct that the wife died a few seconds before the husband, appears to me impossible. The conclusion, therefore, that I come to is upon the assumption that we cannot tell which of these two persons died first, and this is the conclusion at which the Master of the Rolls also arrived.

In the report of the case before the Master of the Rolls, his Honor is represented in one passage to have said that he must assume that Mr. and Mrs. Underwood both died together. From personal communication with his Honor, I know that he is not

aware that he ever used such an expression, and all he ever

* 661 meant to say was * that the property must be distributed

just as it would have been if they had both died at the same moment. It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination, and to adjudicate on such a principle would, I think, be proceeding on false data ; but the real ground to proceed on is that it cannot be proved which died first.¹ They both probably died within a few seconds of each other, but which died first it is impossible to say. The result therefore is, that there being a will giving away the property in one state of circumstances, namely, that the wife died in the husband's lifetime, and it not being proved that that state of circumstances existed, the property is not given away at all, and must be distributed amongst the next of kin as upon an intestacy. These considerations would have exhausted the subject, but for the very able argument that was addressed to the Court on another point, and to which I think it necessary now to advert.

Besides the curious and interesting questions as to the survivorship of the husband and wife, *Mr. Roupell* raised another point on the construction of the wills, and on this I did not consult the learned Judges. It may be considered by reference to the husband's will only. [His Lordship here referred to the terms of the

¹ See *Coye v. Leach*, 8 Met. 371.

will. (a)] It was contended that, even adopting the view of the Master of the Rolls on the question of survivorship, still the bequest to the defendant Mr. Wing took effect. The intention, it was said, was to give the whole residue to him, if, from any cause whatever, the prior alternative gift * to the wife could not * 662 take effect. Here neither she nor those claiming under her can, it was said, claim any thing, in consequence of its being impossible to show that she survived her husband, and therefore the gift over, or rather the substituted gift to Mr. Wing, the children being out of the case, must, it was contended, take effect. The gift to him is in terms dependent on the wife dying in the husband's lifetime; but it was argued that both principle and authority lead to the conclusion, that, if from any cause whatever, the prior gift cannot take effect, the second or alternative gift becomes operative. In support of this proposition many cases were cited and relied on, all which may, I think, be classed under two heads: first, cases where there is a prior particular interest given, and then on the death of the devisee or legatee in remainder under age there is a gift over, and the gift over has been held to take effect, though the first taker never came into existence, and so could not fulfil literally the condition of dying under twenty-one; and, secondly, cases where a devise or bequest is made with an obligation imposed on the devisee or legatee to do some act in default of which being done there is a gift over, if the devisee or legatee dies in the testator's lifetime there the gift over has been held to take effect.

In illustration of the first class I need only refer to the leading case of *Jones v. Westcomb*, (b) the same question having come under consideration in several other cases. There the testator devised a term of years to his wife for her life, and after her death to the child she was then *enceinte* with; and if such child died before it came to the age of twenty-one, then he devised one-third part of the term to his wife and two-thirds to other persons: he died, and the wife turned out not to be *enceinte* at all, consequently the gift over never literally * came into operation, * 663 because that child had not died under twenty-one, there never having been any child.

(a) The Lord Chancellor stated that, to avoid being misunderstood, he had reduced into writing his view of this part of the case; and the remainder of the report is taken from the written judgment of his Lordship.

(b) Prec. Ch. 316.

The leading authority under the second head is the case before Lord HARDWICKE of *Avelyn v. Ward*: (a) there the devise was to the testator's brother and his heirs, on express condition that within three months after his decease he should execute a release to his trustee of all claims and demands, but if his brother should neglect to give such release, the devise to him should be void, and in such case he devised the estate to the defendant. The ground on which the Court has proceeded in these cases, and there are many others to the same effect, is, that the gift over, though made in the form of a condition, was, on the true construction of the will, intended to take effect not only if the precise language of the condition was complied with, but also if some different event should happen which would have results the same as the condition. Thus in *Jones v. Westcomb*, the testator, though in terms he gave the property over only in the event of his wife being at the date of his will pregnant and giving birth to a child who should die under twenty-one, yet evidently meant that the ulterior gift should take effect if his wife should not give birth to a child who should attain the age of twenty-one years; just as in the case before Sir W. GRANT of *Murray v. Jones*, (b) that very learned Judge held that the expression "but in case I shall have but one child" necessarily embraced the case of not having any. So in *Avelyn v. Ward*, though the devise to the defendant Ward was, according to the strict language of the will, made dependent on the testator's brother refusing to execute a release within three months after his the testator's decease, which implies his surviving, yet

* 664 the Court saw * its way to the conclusion, that the testator meant the defendant to take if the brother did not, whether he survived and refused to execute the release, or was from any other cause made incapable of taking: indeed, the natural sense of the will there was that if the gift to the brother should prove void from any cause, the defendant should take.

But these cases all proceeded on the doctrine that the event on which the gift over was to come into operation was an event impliedly if not expressly indicated by the language used in the will. This is a safe and just principle of construction, if we only take care not to strain language beyond its fair import. In the present case, I cannot think that any of the authorities warrant the course

(a) 1 Ves. 420.

(b) 2 V. & B. 313.

which the defendant urges me to adopt. The gift to Mr. Wing is in terms made dependent, and was evidently meant to be dependent, on the single event, setting aside the children, of the testator surviving his wife: if she should survive, he gives every thing to her; if she dies in his lifetime, he gives every thing to Mr. Wing: it is impossible to say that there is any third case, or class of cases, to which the language of the will could possibly be applicable. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property; but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object. It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing: the answer is, he has not said so, neither expressly nor impliedly; and, if I were to attempt to supply the omission, *I feel that I should be making, not construing, the testa- * 665 tor's will. These considerations decide the question on the wife's will also. The result therefore is that I think the decree of the Master of the Rolls was right, and so that the appeal must be dismissed; but, from the peculiar nature of the case, I shall give no costs.

Some further discussion took place as to costs, the result of which was that they were ordered to be paid out of the estate.

SIMPSON v. SADD.

1854. November 18, 20, 21. December 2. Before the Lord Chancellor Lord CRANWORTH.

In a suit to compel the defendant specifically to perform an agreement to take a lease: *Held*, that under the circumstances of the case the intended lessee had waived his right to call for the title of the intended lessor.

Form of the decree in this case directed as in *Warren v. Richardson* (Younge, 1). The mere fact of taking possession does not, either in the case of vendor and purchaser, or in that of lessor and lessee, operate as a waiver of the pur-

chaser's or lessee's right to call for the vendor's or lessor's title, though an intention to waive the right is less probable in the former than in the latter instance.¹

THIS was an appeal by the defendant, G. E. Sadd, from a decree made in favour of the plaintiff by Vice-Chancellor STUART, on a special claim, the object of which was to compel the specific performance by the defendant of an agreement to take a lease of certain premises belonging to the plaintiff. The following were the facts of the case.

The plaintiff, being the tenant of two houses, Nos. 16 and 17, Lisle Street, Leicester Square, in the county of Middlesex, together with the warehouses let therewith for the residue of a term of years under two indentures of lease dated respectively the 2d December, 1850, entered into a treaty with the defendant for assigning such leases to him, or for demising the premises to him by way of lease or underlease; and during the treaty, and before the defendant signed the agreement hereafter stated, the

* 666 * leases were produced and read over to the defendant; and upon his being satisfied with the covenants contained therein, the following agreement in writing was entered into between the plaintiff and the defendant and signed by them.

“Memorandum of agreement made this 12th day of November, 1853, between Miles Simpson and George Sadd, whereby the former agrees to grant, and the latter agrees to accept, a lease of No. 16, Lisle Street, from Christmas next, at the annual rent of 85*l.* 6*s.* 6*d.*, payable quarterly for the term of twelve years and three-quarters less fourteen days. The said Miles Simpson also agrees to grant, and the said George Sadd to accept, a lease of No. 17, Lisle Street, from Christmas next, at the annual rent of 134*l.* 13*s.* 4*d.* payable quarterly for the term of sixteen years less fourteen days, both such leases to contain the same covenants and clauses, so far as applicable, as are contained in the leases under which the same are now held, the said George Sadd to have possession on the 21st November instant of all the warehouses on the ground-floors, also the possession of the upper part of No. 17, now occupied by Mr. Williams, on or before Christmas next, or so soon as the said

¹ See 1 Sugden V. & P. (7th Am. ed.) 463, 466 *et seq.*; Barnett v. Gaines, 8 Ala. 373; Calcraft v. Roebuck, 1 Ves. (Sumner's ed.) 226 n. (2); 2 Dan. Ch. Pr. (4th Am. ed.) 988, 989.

Miles Simpson can get him out, which he engages to do as soon as by due diligence he can do so, the present tenant of the upper part of No. 16 to be adopted or otherwise by George Sadd after next Christmas, and such tenant is to pay Miles Simpson the rent for the same to next Christmas, George Sadd to pay rent only from Christmas next, all outgoings up to that time to be paid by Miles Simpson. The tenant's fixtures of every description for trade and otherwise in the said two houses to be now valued in the usual way, and paid for by George Sadd, the amount of them to be added to the sum for which Miles Simpson is to draw bills on George * Sadd for goods now purchased of him by the latter * 667 and to be included in such bills, the expenses of such valuation to be paid equally by both parties, the said two leases and counterparts thereof to be prepared by the solicitors of Miles Simpson, and paid for by George Sadd."

On the 12th November, 1853, the defendant took possession of the warehouses held with the tenements; and on the 21st November, 1853, the plaintiff's solicitors wrote the following letter to the defendant: "We understand that Mr. Williams leaves No. 17 this morning, so that you can at once have possession of the part he occupied as well as the warehouses which you entered upon last week. We are proceeding to prepare the leases, and Mr. Green will meet your valuer as to the fixtures." The defendant, on the same day, took possession of the whole of the premises except the warehouses of which he had previously taken possession, and on the 25th November, 1853, the plaintiff's solicitors received from him the following letter: "I shall be much obliged if you will defer the preparation of the leases of the Lisle Street premises, as I have a prospect of finding a partner in that matter, who I think should be included therein. I have written as above to Mr. Simpson, but find he is absent from London." In answer to this letter, the plaintiff's solicitors, on the same day, wrote as follows: "There will be no objection to adding the name of a partner as joint lessee with you in the two leases from Mr. Simpson: we therefore wait to receive his name from you at your early convenience."

On the 2d December, 1853, the fixtures in both the houses were valued pursuant to the agreement by two valuers, one appointed by each party, at the sum of 160*l.* 11*s.* The plaintiff's solicitors, not having received * any further communication from * 668

the defendant, prepared drafts of the leases, and on the 10th December, 1853, sent them to the defendant with the following letter: "Herewith we send for your perusal the drafts of the two leases of 16 and 17, Lisle Street, and beg you to return them to us approved at your early convenience. Please also send us your acceptance for 160*l.* 11*s.*, the valuation of the fixtures in the annexed form."

In the mean time, on the 8th December, 1853, the defendant had caused an advertisement to be inserted in the "Times" newspaper, announcing that the premises Nos. 16 and 17, Lisle Street, were to be let with immediate possession with fittings and fixtures complete, and that particulars could be had of Sadd & Napier, 40 Lisle Street, Leicester Square. On the 12th December, 1853, the plaintiff attended at the office of the plaintiff's solicitors with the defendant at his request to discuss his proposal for joining his partner, Mr. Napier, as a co-lessee in the leases, and on that occasion the plaintiff assented thereto, and no allusion whatever was then made to any abstract or proof of the plaintiff's title being required, but the defendant said that all he was waiting for was to settle who should be the lessee or lessees. The defendant not having returned the draft leases, the plaintiff's solicitors wrote to him on the 18th January, 1854, and received the following answer dated Cambridge, the 20th January, 1854: "In reply to yours received this morning, I shall return to London on Monday, and will get Mr. Huson to examine the drafts of the leases for me, and again communicate with you as soon as I can."

Frequent applications, both written and verbal, were afterwards made to the defendant relative to the return of the drafts of
 * 669 the leases, for the purpose of completing * and carrying into effect the agreement; after which, on the 16th March, 1854, the plaintiff's solicitors received a letter from the defendant's solicitor, "requesting, on behalf of Mr. George Sadd, that they would furnish him without delay with abstracts of their client Mr. Miles Simpson's title to Nos. 16 and 17, Lisle Street, in order that he might ascertain whether Mr. Simpson had a good title to the premises in question." The plaintiff's solicitors replied on the 24th March, 1854, and stated that Mr. Sadd had no right to require Mr. Simpson to produce his title; that he was fully informed before he signed the agreement of the nature of Mr. Simpson's holding, and both the original leases were read to him; that he took pos-

session on the 21st November, 1853, and had remained in possession ever since, and had negotiated with various persons for the disposal of the premises; that the draft leases were sent to him on the 10th December, and he had since on different occasions applied for and obtained time to complete, solely on the ground that he was treating with a proposed purchaser, and wanted a further opportunity of concluding with him; that the plaintiff's solicitors therefore considered that the drafts were approved, and they requested that the matter might be concluded at once. On the 30th March, 1854, the defendant's solicitor wrote in reply, submitting that his client's right to investigate the title was beyond all doubt, and as the abstract had been refused, it was Mr. Sadd's intention to give up possession of the premises on the next day. A copy of the following notice, which had in the mean time been served on the plaintiff, was enclosed in the last-mentioned letter: "16 and 17, Lisle Street. Your solicitors, Messrs. Sheard and Baker, having failed to supply my solicitor, Mr. Story, with the abstract of your title to the above premises, I hereby give you notice that I consider you have abandoned the agreement for granting me the lease * of the said premises, and I have * 670 instructed my solicitor to return the draft leases sent for my approval; and I further give you notice, that I will not be responsible for the safety of the said premises in any way after the hour of twelve o'clock at noon of 31st day of March, instant, at which time I intend to abandon the possession of the said houses. Dated this 30th day of March, 1854. G. E. SADD, (Witness) L. HAND. To Mr. Miles Simpson." The plaintiff's solicitors wrote an answer to the last-mentioned letter of the 30th March, 1854, on the same day, to the effect that the plaintiff adhered to the agreement, and that he would at once institute a suit in Chancery to compel the performance of it; that he also demanded the payment of 160*l.* 11*s.*, the valuation price of the fixtures, and, unless the amount was immediately paid, would commence an action for its recovery.

On the 31st March, 1854, the defendant's solicitor returned to the plaintiff's solicitors the drafts of the proposed leases. The plaintiff subsequently commenced an action at law against the defendant, for the amount of rent due and the valuation of the fixtures, but this action was stayed by an order to elect, obtained by the defendant on the institution of the present suit. It should

also be stated that it did not appear that, previously to the 16th March, 1854, any application had been made by the defendant, or by any person on his behalf, for an abstract of the plaintiff's title to the premises; that the defendant had, since he entered into possession of the premises, acted as the owner thereof; had adopted as his own tenant the occupier of the upper part of No. 16, Lisle Street; and had been assessed to, and had paid, rates and taxes in respect of the premises.

The cause was heard by Vice-Chancellor STUART, on the 27th June, 1854, when his Honor made a decree declaring * 671 * that the defendant accepted the plaintiff's title to the premises comprised in the agreement, and ordering and decreeing that the agreement should be specifically performed and carried into execution, and ordering that the lease should be settled by the Judge, in case the parties differed about the same, and that the defendant should within three weeks pay to the plaintiff the sum of 160*l.* 11*s.*, the amount of the fixtures, and the sum of 109*l.* 19*s.* 11*d.*, the amount due for rent from the 25th day of December, 1853, to the 24th day of June, 1854, and the costs of the action at law, and ordering that the defendant should pay to the plaintiff his costs of the suit. From this decree the defendant now appealed, as above stated.

Mr. Malins and *Mr. Walford*, for the plaintiff, supported the decision of the Vice-Chancellor. — They submitted that the substantial question was, whether the defendant had or had not intended to waive his right to call for the plaintiff's title; and, referring to the fact of the defendant's entering into possession and to his subsequent conduct, they contended that he must be taken to have waived his right. They cited *Fleetwood v. Green*, (a) *Margravine of Anspach v. Noel*, (b) *Burnell v. Brown*, (c) *Burroughs v. Oakley*, (d) *Warren v. Richardson*, (e) Sugden's Concise View of the Law of Vendors and Purchasers, p. 243, &c.

Mr. Craig and *Mr. Morris*, for the defendant, the appellant. — They commented on the cases cited on the other side, and * 672 mentioned *Knatchbull v. Grueber*. (g) In reference * to

(a) 15 Ves. 594.

(b) 1 Madd. 310.

(c) 1 J. & W. 168.

(d) 3 Swanst. 159.

(e) Younge, 1.

(g) 1 Madd. 153.

the taking of possession, they submitted that no conclusion could be drawn from that fact against the defendant, and that before any case of waiver could be relied on, it must be proved that the defendant was aware of his right. They contended that the defendant was entitled to an inquiry as to the title. They further objected to the language of the decree, insisting that, if made at all, the decree ought to have followed the form of that in *Warren v. Richardson*.

Mr. Malins replied.

The Lord Chancellor said that the question was, whether the defendant was bound to accept a lease without calling for the plaintiff's title. The agreement was made on the 12th November, 1853, and possession was immediately taken by the defendant. *Prima facie*, a lessee was entitled to call for his lessor's title; and taking possession was in itself an equivocal act, the question in every such case being, whether the lessee by taking possession intended to waive and had waived his right to call for a title. Such an intention might be more probable in the case of a lessee, especially a lessee at rack-rent, than in the case of a purchaser, but the mere fact of taking possession was not of itself sufficient. The question, therefore, in the present case was, whether the conduct of the defendant was inconsistent with an intention to call for the title. The facts were, that on the 2d December, the defendant joined in a valuation of the fixtures, and on the 8th December inserted an advertisement in the "Times" for the purpose of disposing of the property; there were also the letters of the 25th November and the 10th December, showing that the parties understood that nothing remained to be done but to execute the lease, the letter of the 10th December requiring payment from the defendant of the price of the * fixtures: there was * 673 besides the meeting of the 12th December, at which the defendant said that all he was waiting for was to settle who should be lessee. These facts were quite inconsistent with the notion that there was an important step to be taken prior to settling the leases, as also was the subsequent correspondence urging the return of the drafts, and the defendant's letter from Cambridge of the 20th January. The result, therefore, was to produce the irresist-

ible conviction, that the defendant never meant to ask for more than a lease without calling for the plaintiff's title.

His Lordship, in reference to the language of the decree, said that it was wrong; it should have been according to that pronounced by the Chief Baron in *Warren v. Richardson*, (a) namely, that the defendant had waived his right to call for production of the plaintiff's title. This was, however, probably a mere formal difference; but there was also a point in which the decree was wrong in substance, for it made the defendant pay the costs of the action at law; this it ought not to have done, and in that respect the decree must be altered.

His Lordship added that the authorities, referring also to *Clive v. Beaumont*, (b) were not against the view which, following the Vice-Chancellor, he had taken of the case. The rule was stated very accurately by Sir T. PLUMER in *Burroughs v. Oakley*; (c) and in conformity with the rule so propounded his Lordship thought, as the Vice-Chancellor had thought, that the just conclusion of fact in the present case was that the defendant intended to waive, and did waive, his right to call for a title. The appeal must therefore be dismissed.

1854. November 11, 13, 14, 15. December 2. Before the Lord Chancellor Lord CRANWORTH.

By an agreement for the lease of a coal-mine it was stipulated that the rent and terms of working the mine should be determined by R. H. and J. S., and in case of their not agreeing then that the same should be determined by a person to be nominated by R. H. and J. S. before entering upon the reference: R. H. and J. S. chose J. P. as an umpire, entered upon the reference, but refused to examine any witnesses: an award was ultimately made signed by R. H., J. S., and J. P. with which the intended lessee was dissatisfied: a suit was after the lapse of a considerable time instituted by the intended lessor to compel a specific performance of the agreement, and various grounds of objection to the award were raised by way of defence: *Held*, dismissing the bill, first, that the award must under the circumstances of the case be treated as that of the referees only; secondly, that it was not a valid objection that the referees had refused to examine witnesses, or that one of the referees,

(a) *Younge*, 1.

(b) 1 De G. & S. 397.

(c) 3 Swanst. 159.

instead of himself inspecting the mine, had acted on the report made to him by another person; ¹ thirdly, that it would not have been a valid objection if the referees had consulted the umpire merely for the purpose of enabling them to form their own opinion; and, fourthly, that it was a valid objection that the referees consulted the umpire, and then, instead of making up their own minds and if disagreeing leaving the matter to the umpire to be determined by him, had made an award which was contrary to the opinion of one of the referees.²

Semble, that it was also a valid objection that the award had not been signed by the referees at the same time.³

The award being made on the 13th April was communicated to the intended lessee on the 10th June, and was on the 8th August objected to by him on the grounds above mentioned: the Court, though inclined to consider that the objections were taken in good time, did not decide the point, for it held that the lessors were by subsequent conduct prevented from raising the question.

The intended lessee after objecting to the award continued to work the mine, but finally abandoned it in February, 1849: the plaintiff did not file his bill until July, 1852: *semble*, this delay would have been sufficient to prevent the Court from making a decree for specific performance.⁴

THIS was an appeal by the defendant, John Williams, against a decree of Vice-Chancellor STUART dated the 2d June, 1854, declaring that a certain agreement dated the 11th February, 1848, ought

¹ As to the conclusiveness of awards, see *Mickles v. Thayer*, 14 Allen, 114; *Fairchild v. Adams*, 11 Cush. 549; *Bigelow v. Newell*, 10 Pick. 348; *Smith v. Boston and Maine Railroad*, 16 Gray, 521; *Boston Water-power Co. v. Gray*, 6 Met. 131.

² See *Haven v. Winnisimmet Co.*, 11 Allen, 377. On a reference to two arbitrators, the parties consented that the arbitrators might consult a third person. The arbitrators agreed to be bound by his opinion on two of the questions referred, and, having adopted this opinion without exercising their own judgment upon the matters, made their award accordingly. It was *held*, that the award was invalid. *Whitmore v. Smith*, 5 H. & N. 824.

³ An award ought to be signed by all the arbitrators in the presence of each other. *Stalworth v. Inns*, 13 M. & W. 466; *Peterson v. Ayre*, 15 C. B. 724; *S. P. Wade v. Dowling*, 4 El. & Bl. 44; *Hinton v. Mead*, 1 Jur. N. S. 46. See *Beck*, *In re* 1 C. B., N. S. 695.

⁴ See *Benson v. Lamb*, 9 Beav. 502; *Pegg v. Wisden*, 16 Beav. 239; 1 *Sugden V. & P.* (7th Am. ed.) 341 and note (1); *Wells v. Smith*, 7 Paige, 22; S. C., 2 Ed. Ch. 68; *Rogers v. Saunders*, 16 Maine, 92; *Garnett v. Macon*, 6 Call, 308; 3 Lead. Cas. in Eq. (3d Am. ed.) [452], 66; *Nott v. Riccard*, 22 Beav. 307; *Macbride v. Weekes*, 22 Beav. 533; *Gordon v. Mahony*, 13 Ir. Eq. Rep. 404; *Scott v. Fields*, 8 Ohio, 92; *Wiswall v. McGown*, 2 Barb. (N. Y.) 270; *De Cordova v. Smith*, 9 Texas, 129; *Higby v. Whitaker*, 8 Ohio, 198; *Remington v. Kelby*, 7 Ohio, 103; *Reed v. Chambers*, 9 Gilf & J. 490.

to be specifically performed and carried into execution, and ordering and decreeing accordingly, and ordering that a lease should be executed by John Eads and Joseph Wilkes Fisher, the plaintiffs, to the defendant of certain mining premises with their appurtenances, and that such covenants, clauses, and agreements should be inserted in the lease as were contained in that behalf in the agreement, according to the terms of a certain award the validity

* 675 of * which was questioned in the suit. The following were the facts of the case.

By an agreement in writing dated the 11th February, 1848, and made between the defendant J. Williams and George Parker since deceased of the first part, and certain parties the representatives of Susannah Holmes deceased of the second part, after reciting that J. Williams and G. Parker were working a mine of coal and ironstone called the Broadwell Colliery, situate near Oldberry in the county of Worcester, in copartnership together, and that the parties of the second part possessed lands and mines adjacent to the said colliery, and that J. Williams and G. Parker had driven gate roads into the vein of coal in such mines called the thick coal, and had proved the quality thereof, it was witnessed that each of the parties thereto of the second part had agreed that the said J. Williams and G. Parker should have liberty and license to dig, win, and get the several beds, veins, and seams of thick and ten-yards coal, Heathen coal, Gubbin ironstone, and white ironstone lying in and under the several pieces or parcels of land and hereditaments delineated on the plan indorsed thereon and coloured blue, and formerly the property of the said Susannah Holmes deceased, at such price or prices, and for such number of years not exceeding twenty-one years, and upon such terms, but subject nevertheless to the several terms and stipulations of the agreement, as should be determined upon by Richard Haines, of Tipton in the county of Stafford, coal-master, and John Southern, of Batman's Hill, in the parish of Sedgley in the county of Stafford, mine agents, persons indifferently chosen for the purpose by the parties to the agreement, and who it was agreed should have full liberty to decide the value of such mines and minerals as between

* 676 the several parties thereto and to * direct the payment of the same to be made at such times and by such instalments as they deemed right, and also the number of years for which such mines and minerals should be held by the said J. Williams and

G. Parker, but subject nevertheless to the terms and stipulations of the agreement; and, in case of the said R. Haines and J. Southern not agreeing upon the price or terms for the working of the said mines and minerals and declaring the same in writing under their hands within three weeks of the day of the date of the agreement, then that the said J. Williams and G. Parker should have liberty and license to dig, win, and get the aforesaid several beds, veins, and seams of thick or ten-yards coal, Heathen coal, Gubbin ironstone, and white ironstone at such price or prices, and for such number of years not exceeding twenty-one years, and upon such terms, but subject nevertheless to the terms and stipulations of the agreement, as should be determined upon by a person to be nominated and chosen by the said R. Haines and J. Southern before they entered upon the aforesaid reference. And in consideration of the aforesaid license the said J. Williams and G. Parker agreed and undertook to pay the sums and observe such terms and conditions in relation to the working of the mines as should be determined upon and appointed by the said R. Haines and J. Southern or the umpire to be nominated and chosen as aforesaid. And the agreement specified certain terms and stipulations relative to the working of the mines, which it is not necessary particularly to notice, and that if and when required by the parties thereto of the second part, their heirs or assigns, the said J. Williams and G. Parker should and would enter into and execute an agreement with the person or persons for the time being entitled to the mines and minerals comprised in the agreement to take and work the same mines and minerals for such a number of years and on such terms * and conditions in all respects as were * 677 therein contained or referred to, and as should be declared by the said referees or their umpire as aforesaid, and would execute a duplicate of such agreement, which agreement and duplicate should contain all usual and proper stipulations and conditions as should be prepared by the solicitors of the parties thereto of the second part, their heirs or assigns, at the expense of the said J. Williams and G. Parker.

The referees duly appointed J. Parker to act as umpire, and by an arrangement between the solicitors of the parties to the agreement, the time for making the award was extended to the 14th April, 1848, and the following memorandum, signed by the solicitors, and dated the 1st April, 1848, was indorsed on the agree-

ment: "Whereas the said within-named Richard Haines and John Southern before they entered on the consideration of the matters referred to them by the within-written agreement duly appointed Jonas Peacock, of Horseley in the parish of Tipton, mine agent, their umpire finally to decide the matters aforesaid in the event of the said Richard Haines and John Southern not agreeing thereon; and whereas the time limited by the within-written agreement for making an award by the said Richard Haines and John Southern on the matters aforesaid has expired without such award having been made, and the several parties to the within-written agreement are desirous to extend the time for making such award: now I, the undersigned Henry Money Wainwright, of Dudley in the county of Worcester, gentleman, as the agent for and on behalf of the several parties to the within-written agreement of the first part, and I, the undersigned William Robinson, of Dudley aforesaid, gentleman, as agent for and on behalf of the several

* 678 parties thereto of the second part, do hereby mutually * undertake and agree that the time for making an award by the said R. Haines and J. Southern under the within-written agreement shall be extended to the 14th of April, instant, and that, if they make no award in writing on the matters referred to them by that day, that the said Jonas Peacock shall finally decide the said matters, provided he makes an award thereon in writing on or before the 14th day of May next; and we do hereby on behalf of the respective parties mutually agree and undertake that they shall severally observe, perform, and abide any award that shall be made by the said R. Haines and J. Southern or by the said Jonas Peacock according to the terms of this memorandum."

An award in writing, under the hands of R. Haines and J. Southern, and also under the hand of J. Peacock, was made and signed by them on the 13th April, 1848. It was in the following terms: "We, the undersigned Richard Haines of, &c., and John Southern of, &c., by virtue of the power given to us by an agreement dated the 11th February, 1848, and made between, &c., and also of a memorandum in writing under the respective hands of William Robinson and Henry Money Wainwright, gentlemen, dated the 1st day of April, 1848, and written at the foot of the before-mentioned agreement, having, previous to entering on the consideration of the matters referred to us by such agreement, appointed Jonas Peacock of, &c., to be our umpire, and finally to decide on

the matters aforesaid in the event of our disagreement thereon, and having examined witnesses and duly investigated the matter referred to us by the before-mentioned agreement, do by this writing under our respective hands declare and award that the price to be paid by the said J. Williams and G. Parker for the mines of thick or ten-yards coal, Heathen coal, Gubbin ironstone, and white ironstone lying under the lands in * the before- * 679 mentioned agreement on a lease thereof for a term of fourteen years from the 11th day of April last, shall be 400*l.* per acre, according to the surface measure and without deduction for faults or otherwise, payable as follows: 400*l.* to be paid down at the time of signing the lease, and 400*l.* per year afterwards, payable quarterly on the 24th June, 29th September, 25th December, and 25th March, until the whole be paid for the first quarterly payment to be due on the 24th June, 1848." And the award proceeded to specify the manner in which the mines should be worked, and that in the lease of the ground to Messrs. Williams and Parker should be contained covenants on their part for payment of the before-mentioned instalment, and working the mines in manner aforesaid, and all other covenants usually inserted in leases of a like nature.

G. Parker died on the 18th May, 1848. On the 10th May, 1848, Messrs. Bourne & Wainwright, the solicitors of the intended lessors, sent to Messrs. Robinson & Fletcher, the solicitors of the intended lessees, a draft of the proposed lease, which they stated had been prepared in conformity with the terms of the agreement, and "the award of Messrs. Haines and Southern." The draft not having been returned, Messrs. Bourne & Wainwright made several applications for it, and on the 30th May, 1848, Messrs. Robinson & Fletcher returned the draft lease to Messrs. Bourne & Wainwright without any written approval thereof, but with a verbal statement to the effect that they had not then seen their client J. Williams, but that, provided the terms were correctly stated, they had no objections to the draft lease. Messrs. Bourne & Wainwright thereupon caused the lease to be engrossed in duplicate, and on the 30th May, 1848, wrote to Messrs. Robinson & Fletcher to request J. Williams to call and sign the counterpart of the lease.

* On the 31st May, 1848, Mr. Robinson wrote to Messrs. * 680 Bourne & Wainwright the following letter: "Mr. John

Williams has been here to-day. He says he has never seen any copy of the award made by Mr. Haines and Mr. Southern, and is perfectly unacquainted with the periods within which the money is payable ; that he has no wish to create delay or throw any obstacle in the completion of your present arrangements, but he cannot consent to execute the lease until he is better acquainted with the facts."

On the 10th June, 1848, Messrs. Bourne & Wainwright sent to Messrs. Robinson & Fletcher a copy of the award, and on the 27th July, 1848, nothing apparently having been done in the mean time, they applied by letter to Messrs. Robinson & Fletcher requesting to be informed whether J. Williams would abide by and perform the award. On the 8th August, 1848, Messrs. Bourne & Wainwright received the following letter in answer from Messrs. Robinson & Fletcher: "Mr. Williams is advised that the award is invalid on several grounds, and he therefore declines according to the terms of it. We are requested, however, to state that he is willing to enter into an equitable arrangement with the parties, notwithstanding his surveyor has ordered the Butty to abandon the mines, as the produce will not pay the wages."

The objections to the validity of the award as stated by the answer of J. Williams in the suit were, that no witnesses, though attending ready to be examined on his part, were allowed to give evidence before the referees and umpire ; that R. Haines, the referee appointed by the lessors, refused to allow any evidence to be given, saying that he himself knew sufficient of the value of the mines ; that J. Southern, the defendant's referee, refused
 * 681 * for some time to sign the award, but was induced to do so by R. Haines and J. Peacock, who urged him that he ought to yield his opinion to that of the majority of them, and that it was useless his standing out, as there were two to one against him. The answer of J. Williams also contained a statement to the following effect, showing the reason for his wishing not to have the lease forced upon him ; that at and previously to the date and execution of the agreement of the 11th February, 1848, it was represented by or on behalf of the parties thereto of the second part to the defendant and G. Parker that the beds of coal comprised in the agreement were, as to the greater part thereof, of the thickness of ten yards or thirty feet, and the defendant and G. Parker accordingly, relying on such representations and conformably with

an arrangement to that effect between them and the intended lessors, proceeded in the month of November, 1847, to drive a gate road into the said beds of coal, but they did not further or otherwise work the same previously to the date and execution of the agreement; that from and after the date and execution of the agreement, and thenceforth down to the month of February, 1849, the defendant together with G. Parker until his death, still relying on the aforesaid representations, duly worked the beds of coal, but during the last-mentioned period the defendant ascertained, as the facts were, that there was no coal in the mine beyond where the gate road had been previously driven, and that the coals, instead of being of the thickness of thirty feet, were in the thickest part only twenty-one feet and no more, and were in many parts only seven and in others only six feet thick from the top to the bottom, and by reason thereof the beds of coal which in surface measurement contained, or purported to contain, 6a. 1r. 25p., duly worked during the whole of the last-mentioned period, were and could be worked to the extent of * 1a. 1r. 28p. surface measure- * 682 ment, and such were the smallness in quantity and the very inferior quality of the coal so worked and got from the beds during the last-mentioned period, that the same, for the purpose of effecting sales thereof, was obliged to be and was mixed in the boats with coal of a good quality, which was drawn from other parts of the Broadwell colliery, and which were also worked by the defendant; and that, moreover, the beds of coal comprised in the agreement, so far as the same had been hitherto worked, from the thinness and inferior quality thereof, were not only of a value to let or work greatly less than was made to appear by the award, but were in fact of a value insufficient to repay the necessary expenses of working the same, and there was either no coal at all or no coal capable of being worked and got in the remainder of the said 6a. 1r. 29p.

It appeared that, after the date of the letter of the 8th August, 1848, the defendant continued to work the mines down to the month of February, 1849, when he finally discontinued to do so. The defendant stated, by his answer, that he did this under the expectation that some equitable arrangement would be entered into with him by the intended lessors with respect to the working

of the said beds of coal, and under the hope that the representations which had been made to him before the agreement, might be eventually substantiated.

The present suit was instituted in July, 1852, by trustees for the parties interested in enforcing the agreement for the lease; and the bill prayed that the defendant might be decreed specifically to perform the agreement of the 11th February, 1848, on his part, and to execute a counterpart of a lease of the mines of coal and ironstone therein mentioned according to the terms of the

directions in writing stated and signed by R. Haines, J. * 683 Southern, * and J. Peacock, the plaintiffs being ready and willing and offering specifically to perform the agreement on their part and to execute a lease of the mines pursuant to the terms of the said direction in writing, and that it might be declared that the defendant had accepted the title of the plaintiffs or at least that he had accepted the title of the parties of the second part to the agreement to the mines and minerals, and, if necessary and proper, that an account might be taken of the quantities of coal and minerals gotten by the defendant and George Parker or by the defendant, or by or under their or his order or direction from under the pieces or parcels of land comprised or referred to in the agreement, and that the amount which under the terms of the agreement and direction in writing ought to be paid for the same might be ascertained, and that the defendant might be decreed to pay such amount to the plaintiffs.

Evidence was gone into relative to the manner in which the award had been made, and also as to what had taken place subsequently to the 8th August, 1848; the effect of it is sufficiently stated by the Lord Chancellor in his judgment. It also appeared that the referees and umpire had not signed the award at the same time, as will be found noticed in the argument on behalf of the defendant.

The cause came on before Vice-Chancellor STUART in June, 1854, when his Honor made a decree in favour of the plaintiffs as above stated; and from this the defendant now appealed.

Mr. Malins and *Mr. Metcalfe*, for the plaintiffs, supported the decree of the Vice-Chancellor. — They went through the * 684 facts of the case, citing and * commenting on *Gregory v.*

Mighell, (a) *Watson v. Reid*, (b) *Southcomb v. The Bishop of Exeter*, (c) *Clarke v. Moore*, (d) *Sudg. Vend. & Purch. Vol. I. p. 200—202* (ed. 10).

Mr. Wigram and *Mr. Toller*, for the defendant, the appellant. — They contended that the award was irregular and bad on several grounds: the referees had refused to examine witnesses; one of them, R. Haines, instead of exercising his own judgment at all on the matter referred to him, had acted entirely on the report of his grandson, Thomas Haines, and the referees had without authority delegated their duties to the umpire: *Anonymous*, (e) *Phipps v. Ingram*, (g) *Little v. Newton*; (h) and, further, the award was not the joint act of the referees, for they did not sign it in the presence of each other as they ought to have done; it was drawn up by the umpire and sent to the referees, who apparently signed it at different times, and it was then signed by the umpire. *Wade v. Dowling*, (i) *Stalworth v. Inns*. (k)

[The Lord Chancellor remarked, that, though he admitted the general principle involved in the last ground of objection, he was not quite satisfied that the rule could be so strictly applied as it must be to support the argument.]

They insisted that if these objections or any of them * were valid, the present bill must fail. If the plaintiffs * 685 relied in its support on any thing else beyond the agreement and the award, they were bound to show in the clearest way the justice of their claim, and this they could not do, for it was clear that the value affixed by the award was excessive as matters had really turned out; the Court would not therefore be inclined to aid them. The laches too of the plaintiffs were another ground disentitling them to relief; if they intended to enforce a contract like that in question, they were bound to have come to the Court without delay. *Lloyd v. Collett*, (l) *Wright v. Howard*, (m)

(a) 18 Ves. 328.

(b) 1 Russ. & M. 236.

(c) 6 Hare, 213.

(d) 1 Jones & Lat. 723.

(e) 2 Chit. 44.

(g) 3 Dowl. 669.

(h) 9 Dowl. 437.

(i) 18 Jur. 728.

(k) 13 M. & W. 466.

(l) 4 Bro. C. C. 469.

(m) 1 S. & S. 190.

Heaphy v. Hill, (a) *Coslake v. Till*, (b) *Watson v. Reid*, (c) *Walker v. Jeffreys*. (d) The defendant had taken possession in anticipation of the award, and therefore that circumstance could not now prevent him from urging the laches of the plaintiffs as a bar to their claim. They also referred to *Dobson v. Groves*, (e) *In re Plewes and Middleton*, (g) *Harvey v. Shelton*. (h)

Mr. Malins replied. — He contended that the cases cited on the other side, to show that the award was bad on the ground that witnesses had not been examined, and that the referees had not exercised their own judgment on the matters referred to them, applied only to judicial awards where the referee was substituted in the place of the Court; that the same strictness was not required in cases like the present, where there was no action: further, that if the award was originally open to objection, the objection ought to have been taken immediately, and could * 686 not be brought * forward now. In reference to the laches of the plaintiffs, he urged that they could not be treated as a bar to relief where the defendant had taken possession. *Clarke v. Moore*. (i) By working the mine, the defendant had rendered it impossible for the Court to restore the plaintiffs to their original position. He commented on the cases cited on the part of the defendant, and referred to *Soulsby v. Hodgson*, (k) *Emery v. Wase*, (l) *Anderson v. Wallace*, (m) *Russell on Arbitrations*, p. 201.

December 2.

The Lord Chancellor delivered judgment.

After giving a history of the facts of the case, down to and including the letter from Messrs. Robinson & Fletcher to Messrs. Bourne & Wainwright on the 8th August, 1848, his Lordship proceeded as follows: —

The first observation that arises is this, that Mr. Williams was clearly entitled, under the terms of the agreement of the 11th February, to have a valid award; and if therefore the award was

(a) 2 S. & S. 29.

(b) 1 Russ. 376.

(c) 1 Russ. & M. 236.

(d) 1 Hare, 341.

(e) 6 Q. B. Rep. 637.

(g) 6 Q. B. Rep. 845.

(h) 7 Beav. 455.

(i) 1 Jones & Lat. 723.

(k) 3 Burr. 1474.

(l) 5 Ves. 846; 8 Ves. 505.

(m) 3 Cl. & Fin. 26.

invalid, and was objected to in due time, there is nothing to bind the defendant. The objections made to the award are, first, that R. Haines, the referee appointed by the lessors in estimating the value, relied exclusively on his grandson to report as to the state of the mine, and did not examine it himself; secondly, that the referees examined no witnesses; thirdly, that they left the matter to the decision of Mr. Peacock, not forming their own judgment, but adopting his; and, fourthly, that the referees did not sign the award both together and at the same time.

* With regard to the award itself, it has this peculiarity * 687 connected with it, that it is signed not only by the referees, but also by the umpire: I, however, treat it merely as the award of the referees, and take the signature of the umpire for nothing, except perhaps as indicating his concurrence: it is not the award of the umpire, but of the referees.

As to the objections, there is no doubt that if they were made in good time the result is fatal to the award. I do not, however, agree in the suggestion that it was incumbent on the referees to examine witnesses. I do not think, when a matter is referred to surveyors or other persons of skill to fix the value of property to be bought or let, that the meaning is that they are necessarily to examine witnesses: they are intrusted from their experience and observation to form a judgment which the parties referring to them agree shall be considered satisfactory. I do not, therefore, think that in the present case it is an objection that the referees did not examine witnesses, provided they *bond fide* meant to say that they knew enough of the subject to decide properly without doing so.

I am not prepared either to say that it is a good ground of objection that the referee did not himself go down the mine, but left it to his grandson to report to him; because in forming a judgment as to the value of any thing, an estate for instance, a person must necessarily proceed in a great measure upon the report of others. Nor should I, for the same reason, have thought it an objection that the referees consulted Mr. Peacock, if the fact had merely been that, having a doubt as to what they ought to say was the value, they had taken this course amongst other means of enabling them to form a correct judgment, Mr. Peacock being a person evidently of skill and competent experience in these * matters; * 688 but I do think it an objection that, instead of consulting him and then forming their own judgment upon, amongst other

things, his estimate of the value, they consult him and make their award, not because his opinion has determined their minds as to what it ought to be, but subscribing to what they think, or one of them at least thinks, wrong because somebody else thinks it right. The evidence as to Mr. Haines, the lessor's referee, shows that he was guided either entirely or mainly by the report of his grandson coupled with his own fifty years' knowledge of the neighbourhood, which of itself I think was quite a legitimate ground to entitle him to sign an award; but as to Mr. Southern, the other referee, it appears, not that he consulted Mr. Peacock, and was satisfied by him of the land being worth 400*l.* an acre, but that he consulted Mr. Peacock, and finding that he said 400*l.* was the value, he, Mr. Southern, although he did not think it worth 200*l.*, concurred in the award, because he thought it of no use differing.¹ That is not a course which referees have a right to pursue, and an award so made was not one by which the persons who had agreed to take the reference were bound: they were entitled to have the unbiassed judgment of the two referees, or, if the two could not concur, then the unbiassed judgment of the umpire, not in a loose way giving an opinion, but dealing judicially with that upon which it had become his duty to decide. That therefore appears to me to be a valid objection to the award.

I am also inclined to think, contrary to my first impression when the matter was stated, that it was also a good ground of objection that the referees did not sign the award together. Upon that, however, I give no opinion, because, for reasons which will appear, it is

¹ When this case was cited on this point in *Whitmore v. Smith*, 5 H. & N. 828, POLLOCK C. B. said: "I doubt whether an arbitrator who has made an award can be permitted to stultify himself, as the arbitrator did in that case. It is well settled in Courts of Common Law, that a juryman cannot be heard to state on his oath that he gave a verdict without agreeing to it." In *Withington v. Warren*, 10 Met. 431, it was held that an award cannot be impeached by showing that one of the arbitrators, relying upon the statement of the chairman who drew up the award, that it was all right, signed it without reading it or knowing its contents, and that it was for a larger sum than was agreed upon by the arbitrators, unless it also appears that the arbitrator was induced by some false representation, fraud, or misconduct to sign a different award from that which he intended. As to the admissibility of the testimony or declarations of arbitrators in regard to the grounds upon which they made their award, see *Withington v. Warren*, 10 Met. 431; *Bigelow v. Maynard*, 4 Cush. 317; *Clark v. Burt*, 4 Cush. 396; *Leavitt v. Comer*, 5 Cush. 129; *Strong v. Strong*, 9 Cush. 560; *Hubbell v. Bissell*, 2 Allen, 196.

not necessary to decide the point, except that I wish it to be understood that if I threw out any doubt on the subject, * I * 689 desire to retract it. I think there is a great deal of good sense in saying that when a matter is referred to two persons to decide by a statement in writing, that writing must be made by the two together, a contemporaneous act; for if one person signs at York on one day, and another at Exeter on another day, it is impossible to know that something may not have occurred in the mean time to induce one party to change his mind if he could. I think, therefore, that in such a case it is the duty of the two persons to keep the matter open to the last moment, and that it is not competent for the one to sign at one time and the other to sign at another. The point, however, is not, as I have said, one which it is necessary to decide here, but I wish to guard myself against being supposed to have said that I do not accede to the above being a correct statement of the law.

It appears that on the 8th August Mr. Williams objected to the award: he may be taken to have objected on that which I consider to be a valid ground of objection, namely, that it was not the genuine opinion of the two referees; and the question then is, was that objection taken in due time? It must be assumed that he knew of the award on the 10th June, or a day or two afterwards; there was thus considerable delay, but it was no doubt a matter in which he was entitled to have some little time to make inquiries, he stating that he did not think the property was worth half the money assigned as its value by the award. He does inquire, and on the 8th August makes his objection, at the same time saying that though he objects to the award he is willing still to negotiate for the purchase upon equitable terms, meaning terms other than those which had been stated in the reference. The suggestion on the part of the plaintiffs is, that, supposing the award to be bad, which I decide it was, this objection was not made in * good time. I, however, feel myself relieved from decid- * 690 ing the very difficult question, of how much delay would be conclusive to shut a person out from making a complaint in a case of this kind, because I come to the clear conclusion that, whether it was made in proper time or not, the plaintiffs concurred in treating it as so made as to open a new negotiation; and my reason for arriving at that conclusion is mainly from the evidence of the plaintiffs themselves.

[His Lordship here read various portions of the plaintiff's evidence to the effect that in October, 1848, the agents of the plaintiff had inspected the mine in company with the agents of the defendant, for the purpose of ascertaining the quantity of coal and fixing a price ; that in October and November, 1848, various inspections and examinations of the mines were made by all parties with the same view, the plaintiffs themselves by their solicitors employing persons to go down and examine on their behalf. His Lordship, after noticing that this account was confirmed by the defendant's witnesses, proceeded as follows : —]

All this appears to me to establish exclusively that, the objection being made to the award on the 8th August, the plaintiffs by their solicitor and by their agent assented to that objection so far as to agree that the mine should be examined again with the view of fixing a value. The persons who went down on the part of the plaintiffs adhered to the opinion which Thomas Haines had originally formed, that it was worth 400*l.* an acre ; the person who went down on the part of the defendant came to a totally opposite conclusion, and thus the matter was carried on into November. The statement of the plaintiffs, then, is that the defendant still continued working the mine ; this the defendant admits ;
* 691 * he says he continued to work the mine until February, when he abandoned it, and that he did so in the hope that he might find it could be worked properly.

The mine being thus abandoned in February, 1849, and the defendant alleging that he was not bound by the award, and that he would not have any thing to do with the matter, nearly three years and a half elapse before any step is taken by the plaintiffs. It was said in argument that, possession having been taken and the mine actually worked, this case is not like those in which a defendant is called upon to do something, but that it resembles more an action for goods sold and delivered ; but I think there is a great fallacy in that argument. It is true, adopting the illustration, that the defendant has had some goods, but what this Court is asked to do is to make itself instrumental to compel him to take other goods. The fact that he has taken some of the goods may or may not be important in showing whether or not he is bound to take the remaining goods ; for if he takes them under certain circumstances, under protest for instance as to the others, though he

may be liable to account for what he has taken, it can give no right to compel him to take the others. It appears to me, upon all principle and authority, that the lapse of time is conclusive against the plaintiffs. I do not know that it would not have been conclusive, if there had not been any thing like an abandonment of possession: it may be that the plaintiffs were not too late to have brought an action; but specific performance is relief which this Court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit. There is no use in going into the authorities in detail. In

Watson v. Reid, (a) Sir JOHN LEACH * refused to make a * 692 decree after the party had been waiting for twelve months, and no sufficient reason was assigned for the delay; and in *Southcomb v. The Bishop of Exeter* (b) a delay had occurred much less than the delay in this case.

It appears to me, therefore, that the case may be shortly stated thus: The award was made on the 13th April; it was invalid if properly objected to, and it was objected to on the 8th August; it may be doubtful whether it was objected to soon enough, having regard to the nature of the objection; but the conduct of the parties shows that the lessors or intended lessors did not mean to avail themselves of any objection for delay up to that time, and that they acquiesced in the suggestion of a new arrangement by sending down their agent over and over again to meet the agent of the other party in order to fix the value; no agreement ever was come to, and in February, 1849, the mine was abandoned; the plaintiffs might then, if their view of the case is correct, have come forward and insisted on specific performance; and they might then have raised the question that the award was good, and that the defendant had by delay in making his objection adopted it. I am of opinion, if it were necessary to pronounce a decision, that they are wrong on both points; I think there was a valid objection to the award, and I am inclined to think that the objection was made in due time. Even if there was no valid objection to the award, the intended lessee refused to be bound by it, saying there had been a valid objection, and that he repudiated the contract in consequence, and quitted possession; after this the plaintiffs allow three and a half years to elapse. It appears to me, with all def-

(a) 1 Russ. & M. 236.

(b) 6 Hare, 213.

erence to the Vice-Chancellor from whom I differ on this
 * 693 occasion, * that this was not a case in which the Court
 could make a decree for specific performance. I think, how-
 ever, that the plaintiffs are entitled to a decree for an account of
 the coal actually raised, which they must be paid for; the decree
 will therefore be varied accordingly.

Some discussion then took place as to the terms of the decree,
 which were finally determined to be according to the following
 minute, the Lord Chancellor holding that the defendant was in
 possession under the agreement: "Vary the decree of the Vice-
 Chancellor, and dismiss the bill with costs so far as it seeks
 a specific performance of the agreement of February, 1848; decree
 for an account of the quantity of coal worked, which the defendant
 is to pay for at the rate of 400*l.* per acre; reserve the costs so far
 as they relate to the account."

* 694 * In the Matter of 5 & 9 WILL. 4, c. 69, and of LADY
 BYRON'S SETTLEMENT.

1853. November 5. Before the LORDS JUSTICES.

Under the Act for facilitating the Conveyance of Workhouses (5 & 6 Will. 4, c. 69), which enables the poor-law guardians to purchase, but not compulsorily, lands of persons under disability, and empowers the Court to order the expenses attending the purchase payment into Court, or application for reinvestment, to be paid by the poor-law guardians, but makes no further provision for payment of the expenses of the investigation of title on a reinvestment: *Held*, that such expenses are, on the interpretation of the whole Act, payable by the poor-law guardians.

THIS was an appeal from the decision of Vice-Chancellor KINDER-
 SLEY, refusing to order payment by the respondents of the costs
 incidental to the reinvestment in land of a sum of money paid
 into Court under the Act (5 & 6 Will. 4, c. 69) for facilitating
 the Conveyance of Workhouses and other Property of Parishes,
 and of Incorporations or Unions of Parishes, in England and
 Wales. (a)

(a) The following were the sections of the Act relied upon:—

Sect. 1. "That it shall be lawful for the commissioners of the King's Maj-

*The appellant was tenant for life of lands in the parish * 695 of Market Bosworth, under the will of Thomas, Viscount Wentworth, dated the 8th of June, 1805.

esty's woods, forests, and land revenues, by and with the consent in writing of the lord high treasurer or the commissioners of his Majesty's treasury, or any three or more of them, and for his Majesty by any grant signed by the Chancellor of the Duchy of Lancaster, and for the Duke of Cornwall by any grant signed by the Chancellor of that duchy, to grant, and for the guardians and overseers of the poor of any parish or union of parishes under the direction and with the approbation of the poor-law commissioners of England and Wales (to be testified by order under their hands and seal), and for any lay or ecclesiastical corporation, aggregate or sole; and for any feoffees or trustees to charitable or other uses, and for any person beneficially seised or entitled in possession as tenant in fee-simple or in fee tail, general or special, or for his own life, or for years determinable on his own life (such estate for life or years not being subject to any rent), or for any term of years in gross whereof not less than 400 shall be unexpired, and subject to no equity of redemption or rent except a nominal rent, and for any married woman entitled or interested as aforesaid to her separate use, and for the guardian, trustee, husband, or committee of any person so seised or entitled, who shall be an infant, married woman (not separately entitled), idiot, lunatic, or under any other disability, to dispose of by way of absolute sale or in exchange for any messuages, lands, or other hereditaments, any lands or buildings for the purpose of the same being used as or converted into a workhouse, or of being used as the site of a workhouse, or of being occupied with a workhouse, or for any other purpose relating to the relief of the poor which the said poor-law commissioners may approve of, with the rights and appurtenances, and to convey the same, and the fee-simple and inheritance thereof, unto the guardians or overseers of any union or parish and their successors, or in such other manner as the said poor-law commissioners may direct, and to accept from and give to such guardians or overseers any moneys by way of equality of exchange."

Sect. 2. " And with regard to the application of money paid for the purchase or on the exchange of hereditaments of persons under disability, be it enacted, that all sums of money which shall be agreed to be paid to any corporation, or to any trustee, guardian, or committee for or on behalf of any infant, ward, lunatic, idiot, married woman, or other person under disability, or to any person whose lands shall be limited in settlement for the purchase or exchange of hereditaments as aforesaid, shall, in case the same shall exceed the sum of 50l., and there shall be no person capable of giving a sufficient discharge for the same, be paid by the said guardians and overseers into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed in his account to the credit of the party who shall be so interested in the said hereditaments, describing them, subject to the order of the said Court of Exchequer, which said Court, on the petition of or motion on behalf of any corporation or person making claim to any such money, is hereby empowered to order summarily the investment of such money in the purchase

* 696 * Under the powers of the above Act, the guardians of the poor of Market Bosworth Union, with the approbation of the poor-law commissioners for England and Wales, entered into a contract with the appellant as tenant for life for the purchase of a portion of the devised estates for 496*l.* 17*s.* 6*d.* The purchase was completed, and the land conveyed by the appellant to the guardians as a site for a workhouse.

The purchase-money was, under an order of the Vice-Chancellor, laid out in the purchase of bank 3*l.* per cent annuities, subject to the further order of the Court, the dividends being ordered to be paid from time to time to the appellant.

Afterwards the appellant entered into an agreement, subject to the approbation of the Court, for the purchase of a piece of land to be conveyed to the uses and upon the trusts affecting the devised estates. The purchase-money was 450*l.*, and she paid a deposit of 257*l.* 18*s.* 4*d.*, on account of the purchase-money, to a mortgagee, to whom that amount was due on a mortgage of the property.

In May, 1853, the appellant presented her petition, praying that the purchase might be carried into effect, and that it might be referred to the conveyancing counsel of the Court to look
* 697 into the title of the vendor to the * land agreed to be purchased ; and if he should approve thereof, then that he might

of real estates, to be settled to the same uses and upon the same trusts as the lands so sold were previously subject to, or in the public funds, and the distribution of the rents and dividends thereof respectively according to the respective interests of the claimants thereof, and to make such other order in the premises as to the Court shall seem reasonable." "And in case of such purchase, payment into the Bank of England and application to the Court of Exchequer as aforesaid, it shall be lawful for the said Court to order the expenses attending such purchase, payment, or application, or any part thereof, to be paid by such guardians or overseers, who shall accordingly pay the same as and when the said Court shall direct, and the money so paid shall be a charge on the poor rates of such parish or such union, as the case may be."

Sect. 9. "That whenever in this Act, in describing any person or party, matter or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and shall be applied to several persons or parties as well as one person or party, and females as well as males, and several matters or things as well as one matter or thing respectively, unless there be something in the subject or context repugnant to such construction."

By the 5 Vict. c. 5, the powers vested in the Court of Exchequer under the above and other similar Acts were transferred to the Court of Chancery.

settle and approve of a proper deed or deeds of conveyance for the purpose of vesting the premises in the trustees of Lord Wentworth's will, to the uses and upon the trusts of that will.

The petition came on to be heard before Vice-Chancellor KINDERSLEY, who directed an inquiry whether a good title could be made to the premises ; and in case a good title could be made, it was ordered that a proper conveyance should be settled, and that, upon the due execution thereof by such parties as should be named in the certificate of approval, the 466*l.* 16*s.* 2*d.* bank 3*l.* per cent annuities in Court should be sold, and that, out of the produce, 192*l.* 1*s.* 8*d.* should be paid to the vendor, being the balance of the purchase-money, and that 257*l.* 18*s.* 4*d.*, the residue of the 450*l.*, should be paid to the appellant in respect of the deposit paid by her. And it was ordered that the residue of the moneys to arise by the said sale, and the sum of 13*l.* 12*s.* cash in the bank, to the like credit, and any interest that might accrue due on the said bank annuities previous to the sale thereinbefore directed, should be paid to the appellant. And it was referred to the taxing master to tax the costs, charges, and expenses of the appellant and of the trustees of the will of Viscount Wentworth of that application ; and it was ordered that such costs and expenses should be paid to the appellant and the trustees respectively by the guardians.

The appellant, on the hearing of her petition, asked for an order directing the taxation, and payment by the guardians of the costs, charges, and expenses of herself and of the trustees of and attending the purchase ; but the Vice-Chancellor was of opinion that upon the true * construction of the provisions of the * 698 Act of Parliament in reference to costs, the Court was not authorized to direct the payment of any other costs and expenses than the costs and expenses which he directed to be paid as above mentioned.

The appellant then presented her petition of appeal from the above order, and prayed that the order might be varied, by directing the taxation, and payment by the guardians to the appellant and the trustees, of their respective costs, charges, and expenses attending the purchase in addition to the costs and expenses directed be taxed and paid by the order.

Mr. Russell and Mr. Renshaw, for the tenant for life, cited *Ex parte Trafford*, (a) *Ex parte Addies' Charity*. (b)

Mr. Daniell and Mr. Pearson, for the poor-law guardians.—The word purchase applies to the purchase for the purposes of the Act, and not to a purchase for the purposes of reinvestment. This is an enabling Act, and not a compulsory one, therefore not open to the same argument in favour of land-owners as the Lands Clauses Act. *Re The London Bridge Acts* (c) is directly in point.

THE LORD JUSTICE KNIGHT BRUCE.—I am of opinion that according to the true construction of this Act of Parliament, it provides for the expenses now in question. A different
* 699 interpretation would throw * the costs not on the capital, but on the tenant for life, the Act containing no provision for payment out of the capital. Moreover, the whole language of the Act shows that there was intended to be a provision of indemnity to the land-owner. The land was taken from the persons entitled to it, not compulsorily, in one sense, I agree, but was taken from them by an exercise of a discretionary authority given to the tenant for life, not by the settlement, but by the Act of Parliament.

THE LORD JUSTICE TURNER.—I am also of opinion that these costs must be paid. When a purchase is made, the money is to be paid into Court, and then the Court has power to order reinvestment in real estate. The legislature must have been aware that expenses would necessarily be incurred in the reinvestment, and yet there is no provision in the Act for payment of those expenses out of the capital. The consequence is, that they must fall either on the party having a limited interest or on the purchasers. We must look at the words of the Act. [His Lordship read them.] It is not, I think, necessary to enter into the argument on the interpretation clause, that the word purchase would include both purchases. I think that, having regard to the absence of any provision for payment out of the capital, the words "attending such application" must be construed to extend to all the expenses

(a) 2 Y. & C. 522.

(b) 3 Hare, 22.

(c) 13 Sim. 180.

with which the application is attended, whether directly or consequentially, and must therefore include the expenses attending the reinvestment which are consequent upon the application. The argument to the contrary would give to the words "attending the application" no greater effect than if the words had been "attending the order." No inconvenience need arise from the opinion which we have expressed, as a provision for these expenses of investment * may be made a condition of the * 700 contract if the guardians mean to protect themselves from the liability to pay them.

It was then arranged that 120*l.* should be paid for all costs, including those at chambers and of conveyancing counsel.

HORWOOD v. GRIFFITH.

1853. November 11, 12, 25. Before the LORDS JUSTICES.

A testatrix was the owner of four debentures of the Spanish government, each of which had impressed upon it the words "Capital 1000*l.*," and purported to secure to the holder 50*l.* per annum in perpetuity, but to be redeemable on payment of "55*l.* per cent on the nominal amount."

By her will she bequeathed thus: "The sum of 2000*l.* Spanish bonds or coupons now belonging to me, and all dividends which shall be due to me thereon at the time of my decease:" *Held*, that two only of the debentures passed, and that parol evidence of declarations of the testatrix as to her intention was inadmissible.

Held, also, by Lord Justice TURNER, that where there is a specific bequest, parol evidence is admissible to show what property there is answering to the description of it; but that if on that evidence it appears that there was property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property.¹

THIS was an appeal of Charles Barry and Harriet his wife (two of the defendants) from a decretal order of Vice-Chancellor STUART, dated the 17th of March, 1853, declaring (amongst other things) that, according to the true construction of the will of Elizabeth Mary Noble Horwood (the testatrix in the cause), two only of four certificates of inscription in the Master's general

¹ See *Sayer v. Sayer*, 1 Jarman Wills (3d Eng. ed.), 649; *ib.* 394, 409; 2 Lead. Cas. in Eq. (3d Am. ed.) 483, 484 [241], [242].

report mentioned were bequeathed to John Leaf and Thomas Baker, upon the trusts by the will declared of the sum of 2000*l.* Spanish bonds or coupons.

The bequest was thus expressed: "I bequeath unto John Leaf of Park Hill Streatham, in the county of Surrey, Esquire, and Thomas Baker of No. 12 Paragon, New Kent Road, Esquire, the sum of two thousand pounds Spanish bonds or coupons now belonging to me, and all dividends or interest which shall be due to me thereon at the time of my decease, upon trust for such person or persons, and for such intents and purposes in

* 701 every respect, as Harriet Barry, the wife of the said * Charles Barry, shall by any deed or deeds, and whether covert or sole, appoint, and in the mean time and subject to such appointment, upon trust to receive and pay the dividends or interest of the said sum, as well those due at the time of my decease as those which may accrue due afterwards, unto the said Harriet Barry for her own use, and from and after the decease of the said Harriet Barry, the said John Leaf and Thomas Baker, and the survivor of them, his executors or administrators, shall stand possessed of the said trust premises, or the unappointed part thereof, upon trust for such person or persons, and for such intents and purposes in every respect, as the said Harriet Barry shall by her last will and testament, and whether covert or sole, appoint, and, in default of such appointment, the same trust premises or the unappointed part thereof, shall fall into and become part of my residuary estate and effects hereinafter bequeathed."

By the Master's report it appeared that the testatrix at the times of making her will and of her death was possessed of four certificates of inscription issued in pursuance of the sixth article of a convention signed at London on the 28th of October, 1828, between King George the Fourth and the then King of Spain, for the final settlement of the claims of British and Spanish subjects.

A formula was agreed upon by the convention for such certificates of inscription in the English language; and they were issued in accordance with such formula, which was as follows:—

"Capital 1000*l.* sterling, equivalent to capital of 100,000 reals vellon. Annuity 50*l.* sterling, equivalent to annuity of
* 702 *5000 reals vellon. This debenture has been issued in satisfaction of an agreement entered into at London the

28th of October, 1828, in execution of a convention signed at Madrid, the 12th of March, 1823, between his Britannic Majesty and the King of Spain, for the payment of the claims of British subjects. Spanish 5 per cent consolidated annuities payable in London, inscribed on the great book of the consolidated debt of Spain. No. —, capital 1000*l.* sterling, being equivalent to capital of 100,000 reals vellon. Annuity 50*l.* sterling, equal to annuity of 5000 reals vellon. The bearer hereof is entitled to an annuity of 50*l.* payable in London in moieties every six months, on the 8th day of March and the 8th day of September. The Spanish Government reserves to itself the right of redeeming this debenture by payment in London during the four years succeeding the date hereof at the rate of 55 per cent or at any subsequent period at the rate of 60 per cent on the nominal amount, giving in either case six months' notice in the London Gazette."

The testatrix had purchased the four certificates of inscriptions, on the recommendation of Charles Barry, the husband of Harriet Barry, to whom a beneficial interest for life was given in the legacy; and Harriet Barry from the time of the respective purchases thereof, up to the last day of payment, preceding the day of the death of the testatrix, received the dividends or interest payable thereon on behalf of the testatrix.

Evidence was also adduced to show, that, frequently on the occasions of Harriet Barry handing to the testatrix the amount of such dividends or interest, the testatrix said to her that some day she, the defendant, would receive it for herself, adding that she, the testatrix, was sure that those who had so much to do with them (meaning the Spanish bonds or coupons) had an undoubted right * to them. It was further deposed that the average * 703 market value of each of the certificates of inscription since the same were purchased by the testatrix had been 250*l.* (or 50*l.* per cent below their nominal value), and that the value had never, since the certificates of inscription had been issued, exceeded on sales 55 per cent (being 45 per cent below their nominal value).

On behalf of the legatee it was insisted that the bequest of the Spanish bonds was a complete and effectual disposition of the four certificates of inscription and of the moneys thereby secured, which were the whole of the Spanish bonds or coupons belonging to the testatrix at the time of making her will, and of her decease. By

way of further corroboration of this alleged intention of the testatrix, a memorandum was tendered in evidence in her handwriting, and found together with the Spanish bonds or coupons after her decease. It was as follows:—

“Put into the deeds of the house of Mr. Halse, Spanish bonds, June 8, 1832. Gave Mr. Charles Barry 1080*l.* to buy two five-hundred Spanish bonds by draft on Messrs. Drummond’s, 1833, April 9. Gave Mr. Charles Barry 1200*l.* by draft on Messrs. Drummond’s for to buy two five-hundred-pounds Spanish bonds which in this paper and the small ones are the numbers. E. M. N. HORWOOD, August 9, 1833.”

The Vice-Chancellor STUART rejected the above evidence, and held that the bequest extended only to the produce of two of the debentures.

The legatee for life appealed from this decision, and upon the appeal adduced additional evidence to show that the testatrix always spoke of her certificates as for 500*l.* each, and of the four as being securities for 2000*l.*

* 704 * *Mr. Rolt* and *Mr. J. J. Jervis* were for the appellant.

The substance of their argument is stated in the judgment of Lord Justice TURNER.

Mr. Walker, Mr. Malins, Mr. Terrell, and Mr. Horace Wright, for the respondents.

The following cases were cited and commented on: *Doe v. Hiscocks*, (a) *Sleech v. Thorington*, (b) *Wigram on Extrinsic Evidence*, Prop. 2, *Doe v. Hubbard*, (c) *Holmes v. Custance*, (d) *Doe v. Chichester*, (e) *Strode v. Russell*, (g) *Attorney-General v. Grote*, (h) *Mallan v. May*. (i)

November 25.

THE LORD JUSTICE KNIGHT BRUCE.—The testatrix in this cause was at the time of making her will, and continued to her death,

(a) 5 M. & W. 363.

(d) 12 Ves. 279.

(b) 2 Ves. Sen. 560.

(e) 4 Dow, 65.

(c) 15 Q. B. 227.

(g) 2 Vern. 621.

(h) 3 Mer. 316; 2 Russ. & Myl. 699.

(i) 11 M. & W. 653; 13 M. & W. 511.

the owner of four securities from the Spanish government, properly, I believe, called debentures. It was the intention and effect of each of the four to secure a perpetual annuity of 50*l.* per annum, that is to say, an annuity of that amount to continue unless and until redeemed; but redeemable by the Spanish government on payment to the holder of 550*l.* if the redemption should take place within a certain period, but if after that period then of 600*l.*

The testatrix thus entitled makes by her will a disposition in these words: [His Lordship read them.]

By this gift it is agreed on all hands that the testatrix, intending either a specific or a demonstrative legacy, bequeathed some portion or the whole of the four debentures * specifically, or * 705 charged them specifically or demonstratively with a legacy of 2000*l.* The question is, which of these things did she do? For upon the Vice-Chancellor STUART's decision, that the effect of the bequest was and only was to give specifically two of the debentures, this appeal by Mrs. Barry and her husband arises. It is clear, and, I repeat, not denied, that, by the expression "bonds or coupons," the testatrix meant the debentures or some or one of the debentures that I have mentioned, and nothing else. This is satisfactorily shown by the extrinsic evidence: by that portion of it, I mean, which is plainly and indisputably admissible.

And perhaps in every instance of a specific or demonstrative legacy disputed some evidence beyond the will must be admissible; nor can it be necessary to refer to Sir W. GRANT's judgment in *Sanford v. Raikes*. (a) Here the extrinsic evidence, consisting in part, at least, of facts found by the Master's report, has been properly agreed on each side to be, as to a portion of it, clearly receivable. Of the residue the admissibility was disputed, and the point was reserved, — a point which I consider it unnecessary to decide; for, in my opinion, the will must be construed in the same manner whether the evidence in dispute be admitted or rejected. The main question is, whether from the passage of the will that I have read, and the evidence which, plainly and necessarily admissible, has been agreed on each side to be so and been admitted accordingly, it can be collected that the testatrix has by that passage of the will given a definite ascertained thing, or a defined portion of

(a) 1 Mer. 653.

a definite ascertained thing, to Mrs. Barry's trustees; and what that thing is, so as to point out to the executors with sufficient * 706 distinctness the particular subject to be appropriated to her use. Now the Master has found, and it is agreed, that the four securities, of which two are in controversy, were some of those issued under the sixth article of the convention mentioned in the report. It follows that each annuity of 50*l.*, thus secured, was intended, in a manner, to represent, and did, in a sense, represent, a nominal capital of 1000*l.* sterling, and was treated in some sort as interest at five per cent on that amount, though no such amount was ever to be paid upon redemption. This seems singular, but the affair was Spanish, and that famous nation is said to be inclined to magniloquence. Accordingly, this phrase occurs twice on the face of each of the four documents, "Capital 1000*l.* sterling, equivalent to capital of 100,000 reals vellon." The phrase so occurs as descriptive of that for which, or in respect of which, the document was intended and issued. Each document, too, contains the expression "nominal amount," used in the same sense and for the same purpose, and certainly and plainly as meaning 1000*l.* It appears to me, therefore, that whatever may have been in the testatrix's mind, she has so expressed herself as to authorize those intrusted with the duty of construing her will to say that she meant a gift to Mrs. Barry's trustees of two of the four securities, and not to authorize a conclusion that she meant to give them more.

The disputed evidence seems to me, as I have said, of no weight against the language of the will and the undisputed evidence. Ladies as well as men may change not only their minds, but their modes of expression, and at different periods describe the same thing in terms not the same. It is perhaps fairly conjecturable, that if this testatrix could be consulted as to her wishes, she would pronounce for Mrs. Barry. I am inclined so to suspect, * 707 but I cannot venture — it would, I think, be unsafe, and not according to a due administration of the law of this country, to venture — to decide on such materials as those before the Court in favour of the appeal, which, however, cannot be considered as frivolous or vexatious. For myself, I repeat that my mind fluctuated during the argument, though I have now arrived at the Vice-Chancellor's conclusion.

November 25.

THE LORD JUSTICE TURNER. —Elizabeth Mary Noble Horwood, the testatrix in this cause, was, at the date of her will and at the time of her death, possessed of four debentures of the government of Spain. These debentures were issued in payment of the claims of British subjects upon the Spanish government in pursuance of a convention between the two governments; and, by the terms of that convention, they were to be issued at 50 per cent discount; meaning, as I understand, that for every 500*l.* of debt due from the government of Spain there was to be a debenture of 1000*l.* The debentures were in the following form: [His Lordship read it.]

The testatrix by her will has bequeathed as follows: "I bequeath to John Leat and Thomas Baker the sum of 2000*l.* Spanish bonds or coupons now belonging to me and all dividends or interest which shall be due to me thereon at the time of my decease." It appears that she never had any property in any manner answering to the description contained in the bequest except the above-mentioned debentures; and the will, therefore, must be read as if the bequest had been of the sum of 2000*l.* Spanish debentures, then belonging to the testatrix. The question upon this appeal is, whether this * bequest is satisfied by two of the * 708 debentures for 1000*l.* each. The Vice-Chancellor has held that it is; and I am of opinion that the conclusion at which his Honor has arrived is correct.

The principal discussion on this appeal has been upon the question of the admissibility of evidence tendered on the part of the appellant to explain this bequest; and it may be convenient, therefore, in the first place to state the rules by which, as I apprehend, that question must be governed. Where there is a specific bequest, evidence must of course be admitted to show what property there is answering to the description contained in the bequest; but if, upon that evidence being admitted, it appears that there was property correctly answering to the specified description, no evidence can, as I conceive, be admitted to show that the bequest was intended to apply to other property. The principal point, therefore, in this case, seems to me to be whether, having regard to the state of the property, two of these debentures do or do not correctly answer to the description contained in this bequest, which involves the question, what is the true meaning of the ex-

pression, "The sum of 2000*l.* Spanish debentures now belonging to me ;" the word "debentures" being, as I have already pointed out, necessarily to be substituted for the words "bonds or coupons."

It was urged on the part of the appellant, that several meanings might be put upon these words ; that, in addition to the meaning ascribed to them by the Vice-Chancellor's order, they might be construed to mean the sum of 2000*l.* sterling out of the Spanish debentures, or Spanish debentures of the value of 2000*l.* ; or that they might refer to the original debts in respect of which
 * 709 the debentures were given, and be construed to mean * the sum of 2000*l.* in respect of which the four debentures were given, each debenture being in respect of a sum of 500*l.* of debt. These several meanings were said on the part of the appellant to create an ambiguity which might be explained by evidence beyond that which merely discloses the state of the property ; and the evidence, it was said, was conclusive to show that the meaning last suggested was the true one. Before, however, the evidence can be admitted, we must be satisfied that the ambiguity exists, and, looking to the state of the property to which this bequest is to be applied, I am satisfied that there is no such ambiguity as would justify the admission of the evidence. With respect to the two meanings first suggested on the part of the appellant, this is not a gift of a sum of money to be raised out of other property, or a gift to be measured by value ; but it is a specific gift of certain things belonging to the testatrix, whatever their value might be : and with respect to the third meaning which the appellant suggests, I think it equally inadmissible ; for the whole description, "the sum of 2000*l.* Spanish debentures," must be taken together, and if it be so taken the Spanish debentures give the character to the gift ; just as in a gift of 2000*l.* 3 per cent consols, the mention of the stock designates the gift.

The appellant's suggestions being thus disposed of, it remains only to consider the meaning put upon the bequest by the Vice-Chancellor's order. Now it cannot of course be denied that these debentures answer the description of Spanish debentures, and if, therefore, two of them do not answer the description of the sum of 2000*l.* Spanish debentures, it must be in consequence of the sum of 2000*l.* forming part of that description ; but if these debentures were to be described with reference to any sum

of money (and this testatrix has thought * proper so to * 710 describe them), it cannot, I think, be said that a description of them as 1000*l.* debentures was not correct. It is true that they do not secure capital sums of 1000*l.*, but neither, on the other hand, do they secure any capital sums. They could not, therefore, take their designation from any capital sums secured by them; but there is twice impressed upon the face of them, capital 1000*l.*, and this, I think, was quite sufficient to warrant their being described as 1000*l.* debentures. I am of opinion, therefore, that two of these debentures correctly answer to the description contained in this bequest; and there being nothing else answering to that description, I think no further evidence than such as I have mentioned can be received.

I have of course looked into the evidence which has been tendered. I am far from satisfied that it would, if admitted, make out the appellant's case; but I prefer resting my judgment upon the evidence not being admissible, my opinion being that the rule upon that subject to which I have referred is a rule of the highest importance, and one which ought not to be broken in upon on unsubstantial grounds. This appeal must therefore be dismissed, but the difficulty of the question warrants the dismissal of it without costs.

* BRYSON v. The WARWICK AND BIRMINGHAM * 711
CANAL COMPANY and Others.¹

1853. November 12, 23, 24. December 22. Before the LORDS JUSTICES.

Committee-men of a provisionally registered railway company entered into an agreement with two incorporated canal companies for the purchase of the canals by the railway company, in the event of power being obtained from Parliament for that purpose, with a proviso that the committee-men should provide out of their own moneys a deposit, which was to be forfeited if no Act should be obtained. The deposit was paid by a check headed with the name of the railway company, signed by three committee-men, and countersigned by the secretary. It was paid by means of a credit transferred to the account of the railway company from that of another provisionally

¹ See *Hopkinson's and Underwood's Case*, 7 De G., M. & G. 193; *Ernest v. Croysdill*, 2 De G., F. & J. 175.

registered railway company, by some of the committee-men who were directors of both. This transaction was not within their powers in either capacity, but the money was subsequently repaid to the latter railway company out of the funds of the former. No Act was obtained; the first-mentioned railway company was dissolved, and was ordered to be wound up: *Held*, —

1. That, notwithstanding the unauthorized transfer of credit, the deposit was trust money of the first-mentioned railway company, as between its subscribers and the canal companies.
2. That the form of the check, and the circumstances under which it was received, affected the canal companies with notice of the trust.
3. That a suit sanctioned by the Master under the Winding-up Act, by one of the subscribers to the first-mentioned railway company, on behalf of himself and the other subscribers, except those who were defendants, against the canal companies, the committee-men, and the official manager of the railway company for the recovery of the deposit, was properly constituted.

THIS was an appeal from a decree of Vice-Chancellor STUART, ordering two canal companies to repay a sum of 10,000*l.*, which had been paid to them by members of the managing committee of a provisionally registered railway company, as a deposit on a contract for the purchase of the canals.

The case is reported in the first volume of Messrs. Smale and Giffard's Reports, page 447, where the facts are fully stated with reference to the judgment in the Court below. The following statement will be found sufficient for the purposes of the present report: —

In 1845 a company was projected for the formation of a line of railway from Northampton to Warwick with a capital of * 712 500,000*l.* in 20,000 shares of 25*l.* each, on * each of which a deposit was to be paid. The company was provisionally registered by the name of "The London and Birmingham Extension, and Northampton, Daventry, Leamington, and Warwick Railway Company."

By the parliamentary contract and subscribers' agreement, each of which was dated the 16th of August, 1845, a committee of management was appointed with various powers therein mentioned, not including any power to purchase lands; but including a power out of the moneys which had been or should be paid, or should thereafter come to their hands or the hands of the bankers of the undertaking, to make such deposits of money as might be necessary for the purpose of complying with the standing orders of Parliament; and generally to do all such other acts as might

be necessary for carrying the undertaking into full and complete effect; and, in the mean time, if the committee of management for the time being should think proper, to invest the moneys which had been or should be paid, or should thereafter come to their hands or the hands of the bankers of the said undertaking, either as deposits or calls to be made upon the subscribers, or any parts or part thereof in any of the government or other public funds, or in the purchase of exchequer bills, or to advance the same moneys or any part thereof on loan or interest to any joint-stock company carrying on business as bankers in either of the cities of London or Westminster, with a condition for repayment on such notice being given to the banking company as should be agreed upon by the committee of management for the time being.

The subscribers' agreement contained similar provisions, and a power, in the event of the application to Parliament in the then next session not being successful, * for the general * 713 committee of management for the time being to renew such applications to Parliament in the then next or any subsequent session. Numerous shares were taken by the plaintiff and other persons, who paid the deposits and signed the agreements. The capital subscribed amounted to 350,000*l.*, and the deposits paid to 18,700*l.*

On the 21st of October, 1845, the defendants, the Warwick and Birmingham Canal Company and the Warwick and Napton Canal Company, two companies incorporated by Act of Parliament with the usual powers, not including any power to sell their undertakings, entered into an agreement in writing, by affixing their corporate seal thereto, between themselves and seven of the directors of the Railway Company. The agreement was thus headed: —

“Terms of an arrangement between the company of proprietors of the Warwick and Birmingham Canal Navigation and the company of proprietors of the Warwick and Napton Canal Navigation, hereinafter mentioned as the ‘canal companies’ of the one part, and the undersigned members of the provisional committee of the London and Birmingham Extension, and Northampton, Daventry, Leamington, and Warwick Railway Company, which last-named company is hereinafter mentioned as the ‘railway company’ of the other part.”

Among the stipulations contained in the agreement were the following: The railway company to purchase the capital stock of the canal companies as they now hold and enjoy the same. 1. The consideration to be the payment for all the capital stock of both canal companies at the rate of 175*l.* per share for the 1000 shares, and 87*l.* 10*s.* for the 1000 half-shares in the Warwick and
 * 714 Birmingham * Canal Company, and 137*l.* 10*s.* per share for the 980 shares in the Warwick and Napton Canal Company, and the discharge of the debts of the canal companies due on bond or mortgage or otherwise, amounting to 139,760*l.*, and other liabilities of the said canal companies amounting to the sum of 5000*l.* 4. The property of the canal companies to be vested in the railway company on the expiration of two calendar months after the passing of such Act of incorporation, if such consideration money shall be paid, or so soon as the same shall be paid, and to be taken subject to all the liabilities of the canal companies. 6. Proper provisions to be inserted in the Act of incorporation, for giving effect to this agreement. 7. The consent of the general meetings of the canal companies to be obtained to this agreement within one month from the date hereof, and the seals of the companies to be affixed to such deeds as may be prepared and settled, with all requisite provisions for giving effect thereto, and all necessary petitions or consents before Parliament to be presented or given by the canal companies; but this agreement, so far as respects the matters before mentioned, to be conditional on the Act of incorporation, and the necessary provisions in this behalf being procured before the 4th of September, 1847, provided that a clause to be approved of and settled by the referees hereinafter mentioned shall be inserted in the deed to be prepared as hereinafter mentioned, to provide for the contingency of a dissolution of Parliament before the expiration of the two next successive sessions, or any unusual prorogation which may interfere with the passing of the Act of incorporation. 8. The undersigned members of the provisional committee to pay down or to procure to be contributed and paid down on the day of the date hereof the sum of 10,000*l.*, on the 1st of December next the sum of 15,000*l.*, and on the 1st
 * 715 of January next the further sum of 25,000*l.*, making together * the sum of 50,000*l.*; the before-mentioned sums of money to be lodged in the bank of the Warwick and Leamington Banking Company, in the names of six trustees, three to

be named by the said canal companies, and three by the undersigned members of the provisional committee, upon which the canal companies shall pay interest, after the rate of 2*l.* per annum, from the before-mentioned times of payment until the completion of this agreement, in case the said Act of incorporation shall be obtained, or until the 1st of September, 1847, in case the said Act shall not previously be obtained, or until such further period as may be provided for the completion of this agreement, pursuant to the last preceding clause; the said sum of 50,000*l.* to be held upon the following trusts; namely, until the Act of incorporation shall be obtained, the trustees to apply the said sum of 50,000*l.* as the canal companies shall direct in taking transfers of the bonds or mortgages, or in discharge of any other parts of the said debt of 139,760*l.*, and no interest on the bonds or mortgages so to be transferred shall be received by the trustees, but such interest shall cease to be payable, and shall be extinguished for the benefit of the canal companies. 9. That in case the whole of the said sum of 50,000*l.* shall not be paid to the trustees on or before the 1st of January next, this agreement to be absolutely void, and the sum of 25,000*l.*, instead of the said sum of 39,725*l.*, shall be paid to the canal companies by the said trustees in compensation for their loss and inconvenience; and, in case the sum of 25,000*l.* shall not have been paid to the trustees, the deficiency shall be made good by the undersigned members of the provisional committee: time to be the essence of the agreement. 11. If no Act of Parliament shall be obtained by the railway company before the 1st of September, 1847, or such other period as shall be provided for by the clause for extension of time hereinbefore mentioned, or if such Act of incorporation * shall not authorize * 716 the purchase of the property of the canal company, the sum of 39,729*l.* shall be paid or delivered by the trustees to the canal companies, such sum of 39,725*l.*, with the amount of interest which shall have been extinguished as aforesaid, to be agreed on as compensation for the loss and inconvenience which the canal companies may sustain by being precluded from entering into other agreements, or from applying to Parliament for other powers for the sale or disposition of their property, or otherwise for their advantage, and the residue of the said sum of 50,000*l.* shall be repaid or transferred to the members of the provisional committee. 12. That the terms of this agreement, so far as respects the pay-

ment of the sum of 50,000*l.*, shall be executed and performed by the undersigned members of the said provisional committee, and such members of the provisional committee shall provide such sum of 50,000*l.* out of their own moneys, or procure the same to be paid as aforesaid (so that the canal companies shall not be affected by any special trusts or liabilities which may attach to the paid-up capital of the railway company); the performance of this agreement, so far as respects the deposit and application, in manner hereinbefore mentioned, of the said sum of 50,000*l.*, having been undertaken by the said undersigned members of the provisional committee in respect of their separate interests in the success of the said railway company, and not as agents for the body of proprietors."

Upon the execution of this agreement the secretary of the railway company handed to the solicitor of the canal companies a check for 10,000*l.* in the following words: "The London and Birmingham Extension and Northampton, Daventry, Leamington, and Warwick Railway Company. No. 31. London, 21st of October, 1845. The Commercial Bank of London. Pay W.

* 717 C. * Russell, Esq., or bearer, ten thousand pounds. Frederick Foveaux Weiss, S. N. Fisher, John Edmund de Beauvoir, directors. 10,000*l.* John Hervey, secretary." This check was paid by Mr. Heath into the Leamington and Warwick Bank, and was carried to the credit of Messrs. Russell, Lawrence, and Chamberlayne, and afterwards in pursuance of resolutions of the canal companies to the credit of those companies, by whose directors the amount was received from the railway company's bankers, and was afterwards applied in paying the amounts due on bonds of the canal companies; the bondholders thereupon undertaking to deal with the bonds as Messrs. Russell, Chamberlayne, and Lawrence should direct.

It appeared from the evidence in the cause, though the point was not raised in the pleadings, that, on the morning of the 22d of October, on which day the check was paid by the railway company's bankers, the balance standing to the credit of the company was only 2,949*l.* 14*s.* 9*d.*, and that a large purchase of consols had been made shortly before that time out of the moneys standing to the credit of the company, but that on the morning of the 22d of October, and before the presentation of the check for 10,000*l.*, a check for 12,000*l.* was paid to the credit of the railway company.

This check was drawn on another account at the same bank standing to the credit of another provisionally registered railway company, called the Warwick and Worcester Railway Company. Several of the directors of the Warwick and Worcester Railway Company, including the three by whom the check for 12,000*l.* was drawn, were also directors of the Extension Railway Company.

The consols in which part of the deposits had been invested were afterwards sold, and the 12,000*l.* borrowed for the purpose of meeting the check repaid out of the proceeds.

* In the month of December Mr. Van Sandau, a solicitor, * 718 consulted by the committee-men of the Extension Railway Company, wrote to Mr. Russell, stating that the committee-men had been advised that they had no authority to enter into the agreement, and that the 10,000*l.* belonged to the railway company, and must not be parted with without the sanction of that company.

The bill for authorizing the construction of the railway was rejected by the standing orders' committee, and dissolved under Lord Dalhousie's Act. It was afterwards declared bankrupt, but the adjudication was annulled. See *Ex parte Morrison. (a)*

On the 29th of May, 1849, an order was made for winding up its affairs under the Winding-up Acts; and on the 27th of June following, Mr. Henry Croysdill, one of the defendants, was appointed the official manager of the company. The present bill was filed in the same year by Mr. Bryson, who had signed the parliamentary contract and subscribers' agreement, and paid his deposits on his shares. He had been placed on the list of contributories. The Master had sanctioned the suit, under the 60th section of the Winding-up Act. The bill purported to be filed by the plaintiff on behalf of himself and all the other shareholders (except such as were defendants) against the canal companies, Messrs. Russell, Chamberlayne, and Lawrence, the members of the committee of management of the Extension Railway Company, and the official manager of that company, praying that it might be declared that the 10,000*l.* drawn out of the Commercial Bank of London, or so much thereof as remained invested upon any security, and the mortgages, debentures, bonds, and other securities, upon or in

(a) De Gez, 539.

respect of which any part of the 10,000*l.* had been invested or paid, constituted assets and effects of the railway company,
 * 719 * which ought to be applied according to the provisions of the Joint-stock Companies' Winding-up Act, 1848; and that the defendants William Congreve Russell, John Towers Lawrence, and Henry Thomas Chamberlayne, and the defendants the canal companies might be ordered to make, do, and concur in and procure to be made and done by all other necessary parties, all such acts and deeds as might be necessary or proper for the payment and transfer to the defendant Henry Croysdill as official manager of the railway company, of the said sum, mortgages, debentures, bonds, and securities, and for giving to the contributories of the last-mentioned company the full benefit thereof, and that if necessary and expedient the securities might be sold, and that the canal companies and William Congreve Russell, John Towers Lawrence, and Henry Thomas Chamberlayne, and the other defendants (except the defendant Henry Croysdill), might be ordered to answer and make good the 10,000*l.* with interest thereupon from the time when the same was so received or credited, as in the bill mentioned, or so much of the said sum and interest as might not be realized or produced by means of the securities to the defendant Henry Croysdill, as such official manager as aforesaid to be applied according to the provisions of the last-mentioned Act.

By the decree under appeal, it was declared that the canal companies were bound to repay the 10,000*l.* with interest thereon at 4*l.* per cent per annum, from the 22d day of October, 1845; and it was ordered that the 10,000*l.* and interest, as aforesaid, should be paid to the defendant Henry Croysdill, the official manager of the railway company, by the canal companies on or before the 23d of September, 1853; and it was ordered that in
 * 720 the mean time the bonds and securities in payment * off of which the 10,000*l.* or any part thereof was applied, should be delivered to the defendant Henry Croysdill, as such official manager, as security for the payment of the 10,000*l.* and interest, with liberty to apply. And it was ordered that the said canal companies should pay to the plaintiff the costs of this suit.

Mr. Malins and *Mr. De Gex*, for the plaintiff; and *Mr. Daniel* and *Mr. Selwyn*, for the official manager. — The points involved in the case resolve themselves into three propositions, which are

fully established. First, that the 10,000*l.* was trust money. Secondly, the deposit of that sum with the canal companies, at all events so as to be subject to forfeiture, was in contravention of the trusts. Thirdly, that the canal companies received the money with notice of both of the two former propositions being true in point of fact. The only ground on which the first proposition is disputed is that of the money having been borrowed. That, however, is a circumstance with which a third party has no concern. If a trustee advanced money by means of a check on an overdrawn trust account at his bankers, and the advance constituted a breach of trust, it could not be successfully contended that the *cestuis que trustent*, whose money had been subsequently applied to repay the bankers, had no claim against the borrower if he had notice of the breach of trust; and that is in fact precisely this case. As to the second point, this was clearly a breach of trust. The powers of the promoters of a provisionally registered company are defined by 7 & 8 Vict. c. 110, §§ 23, 24, 25, and do not authorize such a disposition of the funds as this, even if the canals had been in the line of the projected railway. But, in fact, one of the canals was altogether beyond the limits of the line, and the directors might as well have spent the money of the subscribers * in the purchase of any other remote undertaking. * 721 As to the last proposition, the form of the check was sufficient notice that the money was paid out of the funds of a provisionally registered company and was improperly paid; so that the case falls within the principle of *Wilson v. Moore*, (a) *Pannell v. Hurley*, (b) and other cases of that description.

The Solicitor-General, Mr. Glasse, Mr. Baggallay, and Mr. H. Cadman Jones, for the canal companies. — This is a question of considerable importance to the canal companies, for they stand between two adverse claims of which only one appears on this record. We do not mention this circumstance as raising an objection for want of parties, but for the purpose of showing how important it is to the canal companies to have the matter brought fully before the Court, with all the facts of the case, and not in a general way only. The question now before the Court is, whether the canal companies are accountable to the plaintiff on this record.

(a) 1 Myl. & K. 337.

(b) 2 Coll. 241.

Now the evidence only shows that if there is a liability at all, it is a liability to others, and not to the plaintiff. Moreover, the form in which we are sued affords us no protection against another suit, nor against being called on to-morrow to pay the amount over again, which the plaintiff demands from us by this suit. The bill is filed by Charles Edward Bryson on behalf of himself and all other shareholders except the defendants. What is there to prevent another shareholder from filing a similar bill? Another preliminary difficulty is, that after a company has been dissolved and ordered to be wound up under the Winding-up Acts, all the property of the company is vested in the official manager, and one member cannot file a bill on behalf of himself and the other

* 722 * members, to recover a debt due to the dissolved company, except where he can establish a case of collusion between the official manager and the debtor. No such circumstance is alleged here. With respect to the form of the suit we submit to the Court two propositions. First, that in a company of this kind, where the projected scheme proves abortive and is abandoned, each shareholder has a right to recover his own deposit; but no one of them can maintain a bill on behalf of himself and others to recover the deposits of others. Secondly, that according to the provisions of the Winding-up Acts, after an official manager has been appointed, it is not competent for an individual member of the company to sue on behalf of himself and the rest to recover property of the company. The position of a shareholder in an abortive scheme is this. He has a right to recover his deposit. All he needs do is to prove that the contemplated project has been abandoned, and that he paid his contribution for the purpose of the project. Its receipt for that purpose raises an implied *assumpsit* to return the money on the failure of the scheme. Whether any deduction is to be made for expenses or otherwise, depends on the subscribers' agreement. If that agreement stipulates that the persons subscribing their money are to be liable to a proportion of the expenses of the preliminary proceedings, that proportional part may be deducted by those who have received the subscriptions; but the legal right to recover the money subject to such deduction remains. The rights of the individual subscribers are these. Each man's money reverts to him subject to such deduction (if any), and becomes a simple money demand, enforceable by action

alone. If this, however, were not so, still by the Winding-up Act of 1848, the property of the company is vested in the official manager. If a suit is brought, it must be to recover a sum *in solido*, which would be an integral portion of the property of the company. * Therefore an individual contributory * 723 could not maintain a suit to recover the sum. The case is analogous to that of a creditor of a bankrupt or insolvent suing on behalf of himself and the other creditors making the assignees defendants without any special reason for such a course. Such a suit must necessarily fail. *Yewens v. Robinson*, (a) *Heath v. Chadwick*. (b) The words of the 50th section of the Winding-up Act, 1848, are express.

[THE LORD JUSTICE KNIGHT BRUCE. — But they contain these words, “except so far as the Master shall by writing direct to the contrary.”]

That exception does not apply to a case like the present. Nor could any order of the Master, obtained *ex parte*, give the plaintiff a right against the defendants which he would not otherwise have. The Act provides that the property of the company shall become vested in the official manager by virtue of his appointment; and it could not have been intended to derogate from this express provision by a mere direction as to the preliminary steps which are to be taken before instituting a proceeding. Our objection is that the suit is constituted in a manner at variance with the established rules of pleading. The practice of constructive representation is only adopted in cases of necessity, and in cases in which the Court can see to the application and distribution of the fund which the plaintiff seeks to recover on behalf of himself and absent parties, whom he assumes to represent. (c) In order that an absent party may be bound by constructive representation, he must be a person whose rights can be protected by the Court itself. Here the suit does not seek any administration or distribution of the fund. The bill merely seeks that it may be paid to the official manager. Is it clear that an absent subscriber who may not be represented in the

(a) 11 Sim. 105.

(b) 2 Phil. 649.

(c) See *Sibson v. Edgworth*, 2 De G. & Sm. 73.

winding-up proceedings, would be bound by the decree? If
 * 724 not, the defendants may be again sued by * another contributory, notwithstanding the present suit. Adverting again to the terms of the 50th section, not only is all right to the property divested out of the company, and transferred to the official manager, but the official manager has power to sue for it, and thus all necessity for the application of the exceptional practice of constructive representation ceases. There is still one more objection, and that is, that in suits instituted on the principle of constructive representation, there must be an identity of interest between the plaintiff and those whom he assumes to represent. Now if, in such a case as this, there could ever have been a constructive representation, the possibility was determined by the dissolution of the company, or at all events by the order to wind up its affairs. By those proceedings, the bond which united the members together (if there ever was such a bond) was snapped asunder.

With respect to the merits, the contract, so far as the canal companies were concerned, was one entire thing, and was made conditional on an Act of Parliament being obtained. The canal companies could not sell, nor the railway company buy, without an Act of Parliament. The whole contract, therefore, was subject to the condition of the sanction of Parliament being obtained. Collaterally and concurrently with this agreement, a different agreement was entered into between the directors of the railway company and the canal companies. If the canal companies were aware that the directors of the railway company took trust funds and applied them in a manner contrary to the trust, the existence of the separate agreement would not exempt them from restitution. But the first question is, whether *de facto* the canal companies did take trust funds. This is "*cardo causæ*." The plaintiff says,

"It is true that our company borrowed the money, but
 * 725 when borrowed it * became ours." But did the railway company borrow the money? They cannot be said to have borrowed it unless they became liable to the lenders. But the railway company, in fact, did not contract liability to the extent of one farthing by the transaction. Neither the present plaintiff nor any other contributory could have been called upon to replace any part of the money. The borrowing was altogether unauthorized, and created a mere personal demand against the directors

who took the money, whose money it therefore was. *Burmester v. Norris.* (a) It was a fraudulent transaction, of which the railway company cannot avail themselves by adopting it. If any one can recover the money, it is the Warwick and Worcester Company. The plaintiff says that he may adopt the transaction, and that, because the loan was repaid, the borrowed money was his retrospectively. But the directors had no power to repay such a loan; it was by that repayment, if at all, that the breach of trust was committed. Suppose A., who was a trustee for B. and also for C., had an account at Bristol in the former character, and in London in the latter, and suppose he were to take part of B.'s money improperly and pay it into C.'s account, and afterwards to draw it out for purposes of his own: would such a proceeding give C. any title to the money? The distinction is, that an innocent transaction may be adopted and made retroactively good, but that a wrong cannot retroactively be turned into a right. Suppose, again, a person stole a purse and threw it into another's garden, and then in the morning came and removed it: could the owner of the garden take any proceedings founded on that temporary deposit of the stolen article?

Lastly, if it was the money of the railway company, the canal companies had no notice of the trust. To fix * them * 726 with such notice from the mere form of a check, would be going beyond any existing authority, and establish a precedent which would be productive of the greatest inconvenience and embarrassment.

Mr. Malins, in reply.

December 22.

THE LORD JUSTICE TURNER. — This suit is instituted by a shareholder in a projected railway company, called the London and Birmingham Extension, &c., Railway Company, on behalf of himself and all other the shareholders in the same company against the Warwick and Birmingham and Warwick and Napton Canal Companies and other parties, for the purpose of recovering a sum of 10,000*l.* alleged to have been improperly paid out of the assets of the projected railway company upon a contract for the pur-

(a) 6 Exch. 796.

chase of the canals belonging to the two canal companies. The railway company was projected in the year 1845 for the purpose of making a railway from Northampton to Warwick. The proposed capital was 500,000*l.*, to be raised in 20,000 shares of 25*l.* each, whereof 1*l.* 7*s.* 6*d.* was to be paid by way of deposit. The company was provisionally registered, and the plaintiff and various other parties became subscribers. They paid their deposits and executed the usual parliamentary contract and subscribers' agreement adapted to the undertaking, but the company proceeded no further. The total amount of the capital subscribed appears to have been about 350,000*l.*, and the total amount of deposits paid about 18,700*l.* The canal companies were incorporated by Parliament many years ago, but the Acts under which they were incorporated contained no powers to sell the canals, nor did the subscribers' agreement of the railway company contain any

* 727 provisions for the purchase of them. Notwithstanding, * however, the absence of such provisions, several of the members of the provisional committee of the railway company on the 21st of October, 1845, entered into an agreement with the canal companies for the purchase of the canals. [His Lordship read the agreement.]

The agreement was put under the seal of the canal companies, and signed by the members of the projected railway company, who were parties to it; and in pursuance of the agreement the 10,000*l.* stipulated to be paid upon the execution of it was actually paid. It was so paid by the following means: Upon the formation of the railway company an account had been opened in the name of the company with the Commercial Bank of London, to which the deposits were paid. On the 21st of October, 1845, the date of the agreement, three of the members of the provisional committee of the railway company drew and signed a check for the 10,000*l.* upon this account, and the check was countersigned by the secretary of the company. The check was as follows: [His Lordship read it.] This check was handed over to the solicitor of the canal companies at a meeting of the parties in the country on the same 21st of October, and was by him paid into a country bank.

The account of the railway company with the Commercial Bank was not at this time in credit to an amount sufficient to answer the check. The balance to the credit of the account at the close of the 21st of October was, it appears, about 2900*l.*; but on the

morning of the 22d of October, before the check was presented for payment, a sum of 12,000*l.*, which had been borrowed of another railway company, was paid in to the credit of the account, and the check, therefore, when presented on the 22d of October, was paid. The proceeds of the check were, as it appears, afterwards dealt with * by the canal companies, having been employed * 728 under their directions in taking transfers of their bonds and mortgages according to the provisions of the agreement, and some stock in which a portion of the funds of the railway company had been invested was afterwards sold out, and the 12,000*l.* borrowed for the purpose of meeting the check repaid out of the proceeds.

On the 26th of May, 1849, the usual order for winding up the railway company was made under the provisions of the Act of 1848, and on the 27th of June, 1849, Henry Croysdill, who is one of the defendants to the bill, was appointed by the Master to be the official manager of the company.

It is under these circumstances that this bill has been filed for recovering the 10,000*l.*, the ground of suit being that the provisional committee of the railway company had no authority to purchase the canals, and that the 10,000*l.* paid out of the moneys standing to the credit of the railway company with the Commercial Bank (and which are alleged by the bill to have arisen from the deposits of the plaintiff and the other subscribers to the railway company) was improperly paid to and received by the canal companies, with notice to the trust to which those moneys were subject.

The cause was heard before Vice-Chancellor STUART, and by his Honor's decree, dated the 23d of June last, [his Lordship read the decree under appeal.]

It is from this decree that the present appeal has been brought by the canal companies.

Upon the hearing of the appeal it was not attempted to be argued on the part of the appellants that the members * of * 729 the provisional committee of the railway company who entered into the agreement of the 21st of October, 1845, had any authority to bind the company by that agreement. It is clear that they had no such authority. But three points were relied on upon the part of the appellants: first, that the suit was improperly constituted, that the plaintiff had no right to sue on behalf of him-

self and the other shareholders in the railway company ; secondly, that the moneys with which the 10,000*l.* was paid were not trust moneys ; and, thirdly, that if those moneys were trust moneys, the appellants had no notice of the trust.

Upon the first point the appellant's argument was put thus: First, it was said that after the abandonment of a company the right of each shareholder was a separate and distinct right, and that all privity between the shareholders ceased upon the abandonment of the company ; and, secondly, it was contended that upon the appointment of the official manager the right to sue vested in him, and that it could in no event be competent to a shareholder to sue on behalf of himself and the other shareholders after such appointment. With respect to the first of these arguments, however, this is a suit for the purpose of bringing back into the funds of the company moneys alleged to have been held in trust for the company, and which, if recovered, must be applied in ease and exoneration or for the benefit of all the shareholders ; all, therefore, have a common interest in the recovery of the moneys. The case in this respect does not seem to me to be distinguishable from that of an ordinary partnership, in which, though the partnership be dissolved, it subsists for the purpose of winding up the concern.¹ I feel no difficulty, therefore, upon this branch of the argument.

The other branch of the argument was rested upon the provisions of the Winding-up Act. It was said that this * suit
* 730 could not be maintained consistently with the provisions of the 29th and 50th sections of the Act. [His Lordship read these sections.]

Now, assuming that the 29th section gives the official manager a right to sue in a case like the present, and that, according to the 50th section, the suit ought to have been instituted by him, — matters on which it is unnecessary for us to give any opinion, — these sections are again controlled by the 60th section, which enacts that no suit shall be instituted by the official manager without the leave of the Master ; and in the case before us the Master has directed that the suit should be instituted, not by the official manager, but by the plaintiff. To such a case the Act, as I read it, does not in terms refer ; and I think that in the absence of express

¹ See *Butchart v. Dresser*, *ante*, 542, 544, note (3), and cases cited.

enactment it would be much too strong a construction of it to hold that it has taken away the right of a shareholder to sue, which undoubtedly existed up to the moment when the official manager was appointed.

In my opinion, therefore, this suit is properly constituted, and it is necessary to consider the second question raised by the appellant, whether the moneys with which the 10,000*l.* was paid were affected by a trust for the railway company? It was insisted, on the part of the appellants, that they were not, because it was said that they were borrowed moneys, and that the members of the provisional committee had no power to borrow them; that they never became the moneys of the railway company, and that the plaintiff and the other shareholders of the railway company therefore had no interest in them; but whatever may have been the power to borrow these moneys, I take it to be clear that so long as the moneys remained at the bank to the credit of the company the bankers were debtors to the company for * the * 731 amount of the moneys, and they could not be drawn out by the members of the provisional committee in their individual character or otherwise than in their character of trustees. The moneys therefore must, in my opinion, be considered to have been fixed with the character of trust moneys, both whilst they remained at the bank and when they were drawn out of it. It was urged that the company from whom the moneys were borrowed had a right to recover them; but that company has been paid with other moneys of the railway company, and the question we have to consider is not what the rights of that company might have been, but what were the rights as between the shareholders of the railway company and the members of the provisional committee who drew out these moneys and the canal companies claiming through them. Looking at the case in this point of view, I see no right which the members of the provisional committee could have had against the shareholders, except to have insisted that as they had borrowed the moneys for the use of the company, the moneys so borrowed ought to be repaid to them for the purpose of satisfying the parties from whom they had borrowed, which has been already done; and I think the canal companies can be in no better position unless their third point upon the question of notice can be maintained. On this point I think it unnecessary to say much. The form of the check, its being countersigned by the secretary, his attendance

with it at the meeting, and what passed upon that occasion, are, I think, quite sufficient to affect the canal companies with notice.

I am of opinion, therefore, that this appeal must be dismissed, and dismissed with costs.

The Lord Justice KNIGHT BRUCE concurred.

* 732 * The Trustees of the BIRKENHEAD DOCKS v. LAIRD
and the BIRKENHEAD DOCK COMPANY.¹

1853. November 3, 8. Before the LORDS JUSTICES.

A private Act of Parliament does not repeal a former private Act by implication.² Where therefore a private Act of Parliament gave power to commissioners to construct a sea-wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it, under the superintendence of the engineer of the commissioners, it was *held*, that under a subsequent Act empowering a dock company to take some adjoining lands and to make such works for the purposes of their undertaking "as they might deem expedient," the power thus conferred was subject to the provisions of the former Act.³

The 15 & 16 Vict. c. 86, does not give the Court jurisdiction to make a decree merely declaratory of a legal right.⁴

On an appeal from the whole decree made on a motion for a decree, the plaintiff begins.

THIS was a motion by way of appeal from a merely declaratory decree made by the Master of the Rolls upon a motion for a decree. The question in dispute was as to the construction of certain pri-

¹ S. C., 18 Jur. 883; 23 L. J. Ch. 457.

² As to the authority of the legislature to alter, abrogate, or repeal a private Act which confers vested rights, see *Angell and Ames Corp.* (9th ed.) § 31 *et seq.*; *Dartmouth College v. Woodward*, 4 Wheat. 636; 1 Kent (11th ed.), 413 *et seq.*

³ See *Parry v. Croydon Commercial Gas and Coke Co.*, 11 C. B., N. S. 579; S. C., 15 C. B., N. S. 568. A local Act is not, in the absence of any indication of intent to the contrary, repealed by a subsequent public general Act. *Fitzgerald v. Champneys*, 2 John. & H. 31; 7 Jur. N. S. 1006; 9 W. R. 850; S. P., *Parrell v. Wolverhampton Water-works Co.*, 10 C. B., N. S. 576; 4 L. T., N. S. 513.

⁴ See 2 Dan. Ch. Pr. (4th Am. ed.) 1001; *Baylies v. Payson*, 5 Allen, 473.

vate Acts of Parliament, and whether the provisions of two of them (both of which were declared to be public Acts) were in conflict with one another, and, if so, whether the later of the two repealed the provisions of the other.

The contest arose between two corporate bodies, one at first constituted "commissioners" and subsequently denominated "trustees of the Birkenhead Docks," the other a company called the "Birkenhead Dock Company." The former will be called in the following statement the commissioners or the trustees, the latter the company.

The first of the Acts in question was the 7 & 8 Vict. c. 79. It empowered the commissioners to construct floating docks and to form a sea-wall adjoining the river Mersey, along the eastern limits of a pool called Wallasey Pool, between Seacombe Ferry and Woodside Ferry, with an entrance therein to a tidal basin or harbour for shipping, and to form a tidal basin or harbour * within the pool, and a tidal basin at or near Woodside * 733 Ferry.

The next material Act was the 8 & 9 Vict. c. 4 (which received the royal assent on the 8th of May, 1845). By it the commissioners were empowered to construct other sea or wharf walls, the property in which was to be vested in them; but owners of any adjoining to the said sea or wharf walls were empowered, within twelve months from the completion of such walls, to contract with the commissioners for the purchase of, and to purchase so much of, the walls as should front or be constructed along the land so held by or belonging to such owners. And upon payment to the commissioners by any such owner, within eighteen months after the completion of such walls, of such proportion of the said expenses as the number of lineal yards of the walls fronting or constructed along the lands held by him should bear to the total cost of constructing the said walls, such portion of the said walls as should so front or be constructed along the lands of such owner should vest in and become the property of such owner, for the like estate, term, and interest therein, as the estate, term, and interest held by him in such adjoining land, subject to the provisions thereafter mentioned.

By the 19th section of the same Act it was enacted that it should be lawful for the several persons or corporations who should have purchased any portion of the said sea-walls, under the

provisions of the Act, or the respective heirs or assigns of such persons or successors, or assigns of such corporations, at their own expense ; and, after giving three months' notice to the commissioners of their intention so to do, to make openings and navigable gates in any part of the sea-walls which should belong to
 * 734 them respectively ; provided that such openings * and navigable gates should be constructed under the superintendence of the engineer for the time being of the commissioners, and in such form as he should approve of, or (in case of disagreement between the parties desirous of making such openings or navigable gates and the engineer of the commissioners) under the superintendence of the acting conservator for the time being of the river Mersey, and in such form as such acting conservator should approve of.

After the passing of these Acts, viz., on the 30th of June, 1845, an Act was passed (*a*) incorporating the dock company, with power to construct other docks, and to purchase and hold lands for the purposes of the works specified in the Act, within certain restrictions. By the 13th section of this Act it was enacted that it should be lawful for the company, upon the lands described in the plans and book of reference therein referred to (which included lands adjoining the site of part of the walls authorized to be made by the former Acts), and according to the provisions in the company's Act contained, to lay out, build, make, alter, repair, and maintain such docks, basins, and cuts, and such entrances to the same, and such quays, wharfs, approaches, and bridges, and other works, for the purposes of the undertaking, as they might deem expedient.

The company became lessees for a term of seventy-five years, granted by the corporation of Liverpool, of a considerable tract of land on the south side of Wallasey Pool.

On the 22d of July, 1847, an Act was passed (*b*) to alter and amend the Acts relating to the commissioners' docks ; and by section 8 of this Act it was enacted, that upon the request in writing of the owner of any land fronting Wallasey Pool,
 * 735 the commissioners should forthwith cause * an estimate to be made by two engineers, one to be nominated in writing by the commissioners, and the other by such owner as aforesaid,

(*a*) 8 & 9 Vict. c. 60.

(*b*) 10 & 11 Vict. c. 265.

or by their umpire, of the costs of constructing so much of the sea or wharf walls as should front the lands so belonging to such owner, and as should be described in such request as aforesaid, and that a copy of such estimate should be delivered to such owner; and that it should be lawful for such owner, at any time after two months from the receipt of the said estimate, to pay to the commissioners the amount thereof, and that the commissioners should thereupon grant to such owner a mortgage for the amount of the money so paid to them with interest, and should thereupon proceed to construct, and with all reasonable despatch complete, the sea or wharf walls mentioned in the estimate; and that on payment, after completion of the walls, of the whole amount actually expended on the construction of each portion of the said sea or wharf wall, those portions should vest in and become the property of such owner for the like estate, term, and interest therein, as the estate, term, and interest held by him in the land fronting the same, subject to the provisions of the commissioners' Act of 1845.

In August, 1848, the commissioners were by another Act of Parliament (a) incorporated, and their designation changed to that of "the trustees of the Birkenhead Docks," but with all the rights and powers which they had as commissioners.

By articles of agreement, dated the 2d of September, 1850, and made between George Meakin of the first part, the trustees of the second part, and the company of the third part, after reciting, among other things, that by articles of even date therewith George Meakin had contracted to erect wharf walls in front of the company's * land on the south side of Wallasey Pool, and * 736 that it was essential to the company that a portion of such wharf walls should be excavated and deepened, which the trustees were authorized to do, but had no funds then available for that purpose, and that the company had therefore agreed to advance the necessary funds to execute such works, upon having the amount of such advance secured to the company by mortgage, George Meakin contracted with the company to execute the excavations therein mentioned, being excavations of the pool or great float for a width of 100 feet at least, and certain other works therein mentioned. And the company thereby covenanted to pay to George Meakin for

(a) 11 & 12 Vict. c. 144.

executing such works 12,241*l.* 11*s.* 3*d.*, as therein mentioned. And the trustees thereby covenanted with the company to deliver to the company, within one month after the company should require the same, valid mortgages, under the authority of the Act of 1844, and the commissioners' Act of 1845, or one of them, for charging the rates, tolls, and property of the plaintiffs, under their Acts, with the repayment to the company with interest of the moneys to be paid by the company under the provisions of the contract.

The excavations were accordingly made at the expense of the company, but no mortgages had yet been executed by the trustees.

The company had leased a part of their land to the defendant, John Laird, who (as the bill alleged) threatened and intended with their concurrence to take down or lower part of the wharf wall on the south side of the Wallasey Pool, erected in front of the land leased to him by the company, and being part of the land whereof they were lessees, and to make openings in such wall without the approval and not under the superintendence of the plaintiffs' engineer or of the acting conservator for the time being of the river Mersey.

* 737 * The trustees thereupon instituted the present suit, and by their bill prayed that it might be declared that the company and their tenants were not entitled to take down, lower, or alter the wharf wall on the south side of Wallasey Pool, or any part of such wall, unless by making an opening or openings and navigable gates under such superintendence, and with such approval as the trustees' Acts provided for, and that the defendant John Laird and the Birkenhead Dock Company, their servants, agents, and workmen, might be restrained by injunction from taking down, lowering, or altering the wharf wall in front of the land leased by the company to the defendant John Laird on the south side of Wallasey Pool, or any part of such wall, otherwise than under and in conformity with the trustees' Acts.

By the decree under appeal it was declared that the defendants were not justified in taking down, lowering, or altering the wharf wall in front of the land leased by the company to the defendant John Laird on the south side of Wallasey Pool, or any part of such wall, unless by making an opening or navigable gate or gates, unless with the consent or under the superintendence of the engineers of the plaintiffs, or with the sanction and approval of the

conservator of the river Mersey; but the decree did not grant an injunction or any other relief.

On the appeal coming on to be heard, a question arose as to the right to begin.

Their Lordships held that, in this respect, a decree made on motion did not differ from a decree otherwise made, and that, as the appeal was here from the whole decree, the plaintiffs' counsel must begin.

Mr. Follett and *Mr. Goldsmid*, for the plaintiffs, opened the case.

* THE LORD JUSTICE KNIGHT BRUCE. — A difficulty is suggested by my learned brother, which I also feel, as to the power of the Court of Chancery, under the 15 & 16 Vict. c. 86, § 50, to make a decree merely declaratory of a legal right. By the 61st section of that statute the Court is prohibited from directing cases to be stated for the opinion of Courts of Common Law, and the concluding passage of that section is as follows: "but the said Court of Chancery shall have full power to determine any questions of law which, in the judgment of the said Court of Chancery, shall be necessary to be decided previously to the decision of the equitable question at issue between the parties." The same limitation seems to be intended by the direction contained in the 62d section, that in cases where the Court, according to the old practice, declines to grant equitable relief until the legal title or right is established at law, the Court itself may determine such title or right.¹ The difficulty which the Lord Justice feels, and in which I participate, is that the decree contains a declaration of a mere legal right, and does not give any equitable relief. If we should think that an injunction ought to be granted, the difficulty might be removed.

The Solicitor-General and *Mr. Kinglake*, for the defendants, the Birkenhead Dock Company, said that all parties desired to have the opinion of the Court on the construction and operation of the Acts of Parliament, and, in order to obviate any difficulty as to jurisdiction, the defendants would admit that they intended to deal with and make openings in the wall without giving notice to the

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1071.

plaintiffs of their intention to do so, and without constructing such openings under the superintendence of the plaintiffs' engineer or the conservator of the river Mersey.

* 739 * *Mr. Follett* and *Mr. Goldsmid* contended that the 19th section of the 8th Vict. c. 4 did not repeal the 13th section of the 7 & 8 Vict. c. 79.

The Solicitor-General and *Mr. Kinglake* argued that the company's Act was inconsistent with the plaintiffs' Acts, and therefore repealed the former statutes to the extent of such inconsistency.

Mr. Rolt and *Mr. Cairns* appeared for *Mr. Laird*.

Mr. Follett was not called upon to reply.

THE LORD JUSTICE TURNER. — The question which has led to the decree, the subject of the present appeal, is one between the trustees of the Birkenhead Docks and the Birkenhead Dock Company, and it arises out of the following state of circumstances: Adjoining to the river Mersey there lies a pool called Wallasey Pool, and the original scheme of the plaintiffs, the trustees, then the commissioners of the docks, as may be collected from the first Act of Parliament, from which their authority is derived, seems to have been this, — to embank the pool, to construct tidal basins at the entrance of it, and also a tidal basin within the pool; but a subsequent Act was passed by which powers were given to them not only to make a tidal basin within the pool, but to convert the whole of the pool itself up to Wallasey Bridge (a bridge at some distance up the pool) into a floating dock. For this purpose it was necessary that walls should be placed around the edges of the pool, and the conflict between the parties is upon the right to deal with the walls or parts of the walls by which the pool is surrounded for the purposes of the floating dock.

In determining the question it is necessary to look to
* 740 * the provisions of the several Acts of Parliament. [His Lordship referred to the provisions of the first Act, and showed that they did not affect the question. After referring to the provisions of the second Act, his Lordship continued:]

It seems to me that the true meaning of this Act is to vest in

the plaintiffs, the trustees, then the commissioners, the sea or wharf walls surrounding Wallasey Pool, with a power to the owners of adjoining lands to acquire the right to use the sea or wharf walls, and to have openings made in them, subject to the supervisions prescribed by the Act.

It was first said, on the part of the defendants, the dock company, that they are not within the provisions of the plaintiffs' Acts, because they are not purchasers under the 19th section of the second Act, but, in this view of the case, the walls being, as I have observed, vested in the plaintiffs, the defendants, the dock company, could have no power whatever to meddle with those walls except under the provisions of the 10th & 11th Vict. c. 265, and the 8th section of that Act, although it gives them the means of acquiring the property in the walls, makes that property, when acquired, "subject to the provisions in the second recited Act and in that Act contained."

The case on the part of the plaintiffs seems to me, therefore, to rest upon a broader basis than the 19th section of the second Act. It stands upon the general right which is given to the plaintiffs in the walls themselves.

We must see, then, whether the right thus given to the plaintiffs is affected by the Act of Parliament which the defendants, the dock company, obtained for the purpose * of making * 741 their docks, and also whether it is affected by the contract entered into by the parties, and under which the walls in question were built.

First, with reference to the dock company's Act. The question wholly depends upon the 13th section of the Act. It is argued on the part of the defendants that this section destroyed the power conferred upon the plaintiffs by the previous Act of the same session, and vested the whole rights in these walls and the right to deal with them in the dock company. [His Lordship read the 13th section, and proceeded:]

Now, in what position did the matter stand at the time of the passing of this Act of Parliament? At that time powers had been given to the plaintiffs, the dock trustees, to make the walls around Wallasey Pool, for the purpose of constituting the floating dock mentioned in the second Act of Parliament. Do the words which are contained in the 13th section affect that power? As the dock company were incorporated by this Act of Parliament, it was nec-

essary to give them powers to execute their works, and when we are construing this section regard must be had to that necessity. Bearing this in mind as we read the section, we find that there are not more than six or seven words in it which at all bear upon the present question. The power given by it is "to alter, repair, and maintain such docks, basins, and cuts, and such entrances to the same, and such quays, wharfs, approaches, and bridges, and other works for the purposes of the same, as they may deem expedient." The mere power to make the docks, &c., cannot affect the question. It was necessary to be given, and would of course be subject to the antecedent rights vested in the plaintiffs. The

argument must therefore be founded upon the words "as
* 742 they may deem expedient;" but those words applied to * a company who, without the provisions of the statute, could have done no act at all, must, I think, be construed consistently with the rights of other parties as they stood at the time.

With reference to this point, it is not, I think, unimportant to refer to the state of the law with regard to the operation of statutes. It is thus laid down in Jenkin's 5th Century, Case 11: "A special statute does not derogate from a special statute without express words of abrogation."

My opinion upon the construction of these Acts of Parliament is, that the words contained in the 13th section of the 8 & 9 Vict. c. 60 (the dock company's Act) do not affect the rights and powers given to the plaintiffs by the former Acts. If there could be any doubt on the subject, it would, I think, be removed by the subsequent Act, which vests in the plaintiffs all the rights and powers of the commissioners.

It was then argued on the part of the defendants that if the case was not affected by the dock company's Act of Parliament, it was at all events affected by the contract which has been entered into between the parties. But what is this contract? It is a contract merely for the purpose of determining the mode in which the wall shall be built. The question upon which we are to adjudicate is the right of dealing with the wall after it is built. I think there is nothing to be found in the contract which affects the question; and, in truth, I do not know by what authority public trustees, deriving their powers from Parliament to make work for public purposes, could be warranted in deviating from those powers.

The result is, that the decree of the Master of the Rolls,

though not in form correct, is so in substance. * The case * 743 ought not to be treated as depending upon the 19th section only, but upon the more general question, to which I have before adverted, of the right in the walls having been vested in the plaintiffs; and I doubt whether any declaration ought to have been made by the Court, and whether the Court should not have confined itself to the question of the injunction.

The more correct form of order, I think, will be for an injunction in the terms prayed by the bill, that the defendant, John Laird, and the Birkenhead Dock Company, &c., may be restrained from taking down, lowering, or altering, &c., the wharf wall in front of the land leased by the said company to the defendant John Laird, on the south side of Wallasey Pool, otherwise than under or in conformity with the provisions of the Walling Act and the Act of the 10 & 11 Vict. contained.

The Lord Justice KNIGHT BRUCE concurred.

• M'NEILLIE v. ACTON.¹

• 744

1853. November 16, 17. Before the LORDS JUSTICES.

A direction in a will that the testator's trade shall be carried on does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease,² nor does such a direction, coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at his death in the trade, for the purpose of carrying it on.³

Therefore, where the husband of an executrix, under such a will, borrowed money from a person in whom the legal estate of part of the testator's real estate was vested under a satisfied mortgage, stating that the advance was required to carry on the testator's business, and deposited the deeds with the lender, on an agreement that the legal estate still subsisting in him should be a security for the advance: *Held*, that the security was invalid against the persons beneficially interested under the will.

¹ S. C., 17 Jur. 1041.

² See Collyer Partn. (5th Am. ed.) §§ 602, 603; *Burwell v. Mandeville*, 2 How. (U. S.) 560; *Pitkin v. Pitkin*, 7 Conn. 307; *Alsop v. Mathew*, 8 Conn. 587; *Story Partn.* § 70; 2 *Lindley Partn.* (Eng. ed. 1860) 884, 885.

³ See *Lewin Trusts* (5th Eng. ed.), 355.

Quære, whether, if the will had authorized the mortgage, it could have been created without a deed acknowledged by the executrix.

Hankey v. Hammock, 3 Madd. 148, observed upon.

THIS was an appeal from a decree of Vice-Chancellor STUART in a foreclosure suit. The question was as to the validity of the mortgage, with reference to the provisions contained in the will of a testator named William H. Bullock, of whose property the subject of the mortgage formed part. The testator carried on the trade of a coal proprietor at Wigan, under a mining lease for fourteen years from 12th November, 1838. At the time of his death he was entitled to freehold property, subject to a mortgage created by indentures of lease and release of the 5th and 6th of October, 1840, to secure 1500*l.* and interest. The mortgagees were the plaintiff and his brother since deceased, by whom the 1500*l.* was advanced out of money belonging to them on a joint account.

Mr. Bullock died on the 3d of April, 1844, having made his will dated the 21st of March, 1844, whereby, after ordering and directing all his just debts, funeral and testamentary expenses to be in the first place paid and satisfied, he gave unto his wife an annuity of 150*l.* a year for her life; and he thereby charged the whole of his real and personal estate with the payment of the said annuity.

And he gave, devised, and bequeathed all the rest, residue,
* 745 and remainder of his real and personal * estate unto his executors thereafter named and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, upon trust for his son James, his heirs and assigns for ever; and in case his son James should die before he attained the age of twenty-one years without leaving lawful issue him surviving, the testator gave, devised, and bequeathed the whole of his said real and personal estate unto his wife, her heirs, executors, administrators, and assigns for ever; and he directed his executors to continue his trade or business of a coal proprietor during his then present interest in the mines, and that they should not be responsible for any loss to his estate by carrying on the trade or business unless such loss should happen by or through their wilful neglect or default, and that they might compound debts and settle disputes in and about his said estate and business, and refer matters in dispute respecting his trade, estate, or business, to arbitration; and he appointed his wife and Caleb Hilton executrix and executor.

The widow alone proved the will and acted in the trusts. In

1846 she paid the mortgage of 1500*l.* to the plaintiff as surviving mortgagee, and received back from him the title-deeds of the mortgaged property ; but no reconveyance was executed.

In February, 1848, she married Thomas Acton. After the marriage Mr. and Mrs. Acton continued to act in the execution and trusts of the will, and to carry on the testator's business.

The bill stated that after the marriage and in the month of April, 1848, Thomas Acton and Frances his wife, being in want of money for the purposes of the will, and in particular to enable them to meet certain expenses which they had incurred in carrying on the testator's * business pursuant to his direc- * 746 tions, applied for a loan to the plaintiff upon the security of the property comprised in the former mortgage, the legal estate in which still remained in the plaintiff; that the plaintiff accordingly, in May, 1848, advanced 840*l.* to Mr. and Mrs. Acton on that security, and received from them the title-deeds of the property ; but that no mortgage-deed was executed, it having been agreed, at the time of the advance, that Mr. and Mrs. Acton would execute such a mortgage when required, and that the plaintiff in the mean time should have the benefit of the indentures of the 5th and 6th of October, 1840, and should hold the same and the hereditaments and premises thereby conveyed and then vested in the plaintiff, as a security for the repayment of the 840*l.* and interest.

The bill charged that the 840*l.* was advanced and lent by the plaintiff to Thomas Acton and Frances his wife, as representing, by virtue of the will and the probate thereof, the real and personal estate of the testator, and was so advanced and lent by the plaintiff in consequence of repeated applications from Thomas Acton and Frances Acton and of representations made by them, and in particular by the defendant Thomas Acton, that the advance was required to discharge obligations which had been incurred by the executrix in carrying on the testator's trade pursuant to the directions of his will.

Mrs. Acton, by her answer, denied this statement, and stated that her husband, the defendant Thomas Acton, had raised the money to pay his debts and for his own private purposes, and not for the purposes of the will. She further stated that the plaintiff had received back the deeds from the defendant Thomas Acton alone, and not from her, and that she was entirely ignorant of any intention of her husband to apply for the advance, or of

* 747 * the fact of the same having been made, or of the deeds having been deposited until some days afterwards.

By the decree under appeal it was ordered that an account should be taken of what was due to the plaintiff for principal and interest on the equitable mortgage; and that upon repayment of this amount the plaintiff should reconvey the mortgaged premises; but that in default of payment the estate should be sold.

Mr. Bacon and *Mr. Osborne*, for the plaintiff.

[THE LORD JUSTICE KNIGHT BRUCE. — If a husband and wife are seised in fee in right of the wife, and there is a trust to raise money to pay the debts of a third person, can or cannot the trust be executed so as to affect the fee without the judicial examination of the wife, that kind of judicial examination which is substituted for the levying of a fine?]

If the husband, in the due execution of the trust, borrowed money on the security of the estate, and the wife refused to acknowledge a deed under the Fines and Recoveries Act, that would not prevent the person advancing the money from having a lien. Here no deed was necessary. The legal estate was already in the plaintiff. The administratrix and her husband received back the money which the former had paid to the plaintiff, and he was restored to his former security. The charge of debts was of itself sufficient to authorize the transaction: *Ball v. Harris*; (a) *Stroughill v. Anstey*; (b) and to exonerate the plaintiff from seeing to the application of the money, independently of the

* 748 express * trusts of the will. But the direction in the will that the trade should be carried on is equivalent to a clause charging the debts incurred in trade upon the real estate, just as the direction for payment of the testator's debts operates as a charge of them upon his real estate, for the direction that the trade shall be carried on places the debts incurred in it on the same footing as the testator's own debts. *Hankey v. Hammock*. (c)

Mr. Elmsley and *Mr. J. V. Prior*, for the infant *cestui que trust* (the appellant). — The direction to carry on the colliery did not

(a) 4 Myl. & Cr. 264.

(b) 1 De G., M. & G. 635.

(c) 3 Mad. 148, n.; Buck. 211.

empower the trustees to mortgage property not connected with it. *Ex parte Garland*; (a) *Ex parte Richardson*. (b) *Ball v. Harris* (c) does not apply, for the plaintiff had notice that the money was raised, not to pay for debts, but to carry on the colliery. In *Stroughill v. Anstey*, (d) Lord St. LEONARDS said, "I will only add in regard to the general question of distance of time that people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about."

Mr. W. M. James, Mr. Kinglake, and Mr. Prout appeared for other parties.

Mr. Bacon, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — We think, with deference to the Vice-Chancellor, that though by possibility the plaintiff may show himself * entitled to a decree for sale, as a credi- * 749 tor upon the infant's estate, for some sum of money, he has not yet established himself in that position; but it does not appear to us that the bill should therefore be dismissed against the infant, considering, I repeat, that there is a possibility that the infant's estate may prove to have been charged in the plaintiff's favour. Upon the construction of the will it is clear, as it has been admitted on all hands, that the testator's real estate, independently of its liability by the law of the country to his debts, was specially charged with his debts, so as to have become equitable assets, and so as to give the trustee of his will for the time being (subject to the question to which I referred during the argument, as to the power of affecting the inheritance, either legally or equitably, after *Mrs. Acton's* marriage, without an examination of her), a right, acting fairly and in the ordinary course of business, to sell or mortgage the real estate for the purpose of paying the debts of the testator. It is equally clear that the personal estate was the first fund for paying the debts. That is a circumstance, however, which, if the disputed transaction had been of an ordinary kind,

(a) 10 Ves. 110.

(b) 3 Mad. 138.

(c) 4 Myl. & Cr. 264.

(d) 1 De G., M. & G. 654.

with nothing about it to create suspicion, a person advancing money to the trustee might well have been entitled not to look at.

Then, with regard to the direction in the will to continue the trade or business of the testator, the real property in question was not in any sense connected with the colliery or with the business; it was an entirely distinct portion of the testator's estate, and I am of opinion that, according to the true construction of the will, the trustees of it were not authorized to deal with or touch this real estate for the purpose of carrying on or continuing the colliery.

Now, assuming the correctness of those views, let us look
* 750 at some of the peculiar circumstances of the * case. The

plaintiff was a mortgagee of this real estate at the time of the testator's death. The executrix and trustee pays off the mortgage. She marries, and, less than four months after the marriage, her second husband (for it must be taken to be his act) applies to the original mortgagee for a sum exceeding 800*l.*, for the avowed purpose of carrying on the trade or the business; a purpose, in my opinion, for which it was impossible that this real estate could be affected. Still it may be that, either under the lease or otherwise, there was some purpose for which the real estate could be legitimately affected. There may have been. Mr. Acton was entitled to such debt (if any) as was due to his wife from the estate, and he was interested in the annuity bequeathed to her, for I take for granted that this was a case in which the widow married without a settlement. There is on the whole a possibility that the plaintiff may be able to establish some incumbrance, some charge, against the interest of the infant, and with a view to that we have thought that some inquiries should be directed,—if the plaintiff desires them,—inquiries which we propose to preface with declarations, in order to save the Vice-Chancellor and his officers, before whom these inquiries will be prosecuted, as much trouble as possible. We have sketched them with this view.

THE LORD JUSTICE TURNER. — This is a bill filed by a plaintiff claiming to be an equitable mortgagee by a deposit of deeds with him, made by an executrix and trustee under a will. The decree of the Court below has given the mortgagee the full benefit of the charge, and the question before us is whether that decree, in its present state, can be maintained. I am of opinion, with my

learned brother, that the decree as it stands cannot be maintained.

* The argument which was urged on the part of the *751 plaintiff is this: The will contains a direction for the payment of the debts of the testator, thus expressed: "I order and direct all my just debts and funeral and testamentary expenses to be in the first place paid and discharged." And the will also contains a direction in these terms: "And I direct my said executors to continue my said trade or business during my present interest in the mines taken by me at Swinley from the Misses Kenyon." It is urged on the part of the mortgagees that these two directions stand on the same footing, and that the same rule which applies to the direction for payment of debts must also be applied to the direction to continue the business.

Now, why is it that the real estate is charged under the direction for the payment of debts? In the first place, there is a moral duty incumbent on a testator, who makes his will, to pay his debts. In the second place (and this is perhaps the better reason), those words would have no operation unless they were construed so as to charge the real estate, for the law charges the personal estate with the payment of debts; and when a man directs his debts to be paid, he must mean to do more than the law would of itself have done. But no such reasons apply to the case of a direction to continue and carry on his trade. There is no moral duty incumbent on the testator to direct the trade to be carried on, nor is there any state of the law which requires a construction to be put upon the words, so as to make them operate as a charge on the real estate of the testator. The two cases therefore are totally distinct; and the question is whether, on the construction of the will, a mere direction to continue the trade of the testator ought to charge all his real and personal estate with debts contracted in the course of that trade.

* Now no case has been cited which has gone so far. It *752 has been supposed that the case of *Hankey v. Hammock*, referred to by Lord ELDON in *Ex parte Garland*, (a) was an authority of this description; but on examining the decree in *Hankey v. Hammock*, which is set out in the note to *Ex parte Richardson*, (b) it will not be found to go to any such extent. For in

(a) 10 Ves. 110.

(b) 3 Mad. 148, n.; Buck. 211.

Hankey v. Hammock there was no account directed of the general personal estate of the testator, but the inquiries which were directed were what stock and effects there were in the trade at the time of the death of the testator, and what had accrued from the trade from the time of the testator's death until the time when the trade was wound up; and the result of the accounts, as it appeared on the Master's report, was, that the value of the stock of the testator at the time of his death was about 670*l.*, and that certain other moneys had been realized in the course of carrying on the trade, which had been invested in the funds. Although the order on further directions directs that the debts should be paid in the first instance out of the funds which constituted the stock in trade of the testator at the time of his death, and then says that, so far as they are deficient, they shall be made good out of the general personal estate, yet it is clear that those words "general personal estate" referred to the personal estate, which was the subject of the suit, and which had been directed to be the subject of inquiry under the decree, and meant the personal estate which had arisen from the trade after the death of the testator.

There appears, therefore, to be no case which has gone to the extent of saying that a mere direction to continue the trade is to operate as a charge of the trade debts contracted in continuing the trade on all the estate of the testator; and the question is, whether, upon any fair construction, it can be so considered. The consequence of it would be, that all the other directions which are contained in the will must be suspended during the period for which the trade is to be continued. If the debt contracted in the course of the trade, or the right of the executors to be indemnified in respect of the expense incurred in carrying on the trade, is to be a charge on the whole of the estate of the testator, the necessary consequence would be that no part of the estate could in the mean time be applied in payment of any of the legacies given by the will, and that all administration of the testator's estate must stop until the period when the trade is wound up. That is a construction so unreasonable that, unless there are words sufficient for the purpose, it is one, in my opinion, to which the Court would not resort.

Looking at the language of this will, containing as it does merely a direction to continue the trade, without any specific directions as to the assets which are to be employed in it, I am satisfied that

it was not the meaning of this testator that any portion of his assets, beyond that which was employed in the trade at the time of his death, should be considered as the fund for carrying it on after his death: Suppose a grocer in London to say by his will, "I direct my grocery business to be continued;" and suppose him to have had real estate in Northumberland, would it be a probable intention to ascribe to him that his estate in Northumberland was to be sold in order to supply assets to continue the trade carried on in London?

It is, however, said that the executors may not have the means of carrying on the trade, if they are confined to assets which were engaged in it at the time of the * testator's death. * 754 The answer to that argument is plain. The executors, if they find that they have not the means of carrying on the trade according to the directions contained in the will, should come to this Court for directions to know what they are to do in the administration of the estate. It is no greater difficulty than occurs in other cases where the assets of a testator are insufficient for the purposes to which the testator has devoted them.

I therefore think that, according to the true construction of this will, there was no authority in the executors to carry on the trade otherwise than by means of the assets which were employed in the trade at the death of the testator; and that the mortgagee cannot claim by virtue of any deposit made by the executors in that character, although he may have a right against any interest in the testator's real estate to which the mortgagor who deposited the deeds may be entitled. If there were debts of the testator, those debts, so far as the personal estate was not sufficient for their payment, were payable out of the real estate after the due application of the personal estate; and if, in the administration of the assets, it should appear that the mortgagor paid debts of the testator to an amount exceeding the testator's personal estate, without having had recourse to the real estate, he would be entitled to a charge on the real estate to that extent, to the benefit of which the mortgagee would be entitled by virtue of the deposit.

THE LORD JUSTICE KNIGHT BRUCE. — The opinion which I meant to express, but perhaps expressed too briefly, is, that although in general, where there is a charge of debts on real estate, a person advancing money on the security of that estate is not bound to

* 755 inquire whether the money is required so to be raised, * and, if it is raised unnecessarily or is misapplied, is not affected by that circumstance, but the estate is bound, yet in this particular case there were facts differing indeed from those in *Stroughill v. Anstey* (a) specifically, but belonging to the same genus, which were sufficient to put the person advancing the money upon inquiry, and to prevent him from standing in a better position than the persons with whom he dealt.

The following were the minutes of the decree : —

Let the decree be varied and be as follows : declare that, according to the true construction of the will of William Hibbert Bullock, the testator in the pleadings named, the said testator's executors were not authorized or empowered to continue the trade or business in his will mentioned, otherwise than with or by means of the property, capital, stock, and effects which were embarked and employed therein at the time of the death of the said testator.

Declare that the rents and covenants reserved by and contained in the lease, under which the mines in the pleadings mentioned were held, ought to have been, and ought to be, in the first instance, answered out of such property, capital, stock, and effects.

Declare that, subject to the declaration last above contained, the said testator's personal estate not embarked in the trade was applicable in the first place to the payment of his debts. And let the following inquiries be made, that is to say : —

An inquiry whether any, and, if any, what sum of money was advanced and paid by the plaintiff M'Neillie to the defendant Thomas Acton, on the security of the title-deeds of the said testator's real estate, or any or what part thereof, and under * 756 what circumstances. But * declare that the plaintiff in respect of the advances, if any, made by him, is entitled to stand in the place of the defendant Thomas Acton against the real estate of the said testator, comprised in the deeds deposited with him the said plaintiff, in so far, if at all, as the said defendant Thomas Acton had at the time of such deposit any claim or demand against the said real estate, having regard to the due application of the said testator's personal estate, and to the declarations hereinbefore contained.

(a) 1 De G., M. & G. 635.

Then followed a direction for the return of the deposit and inquiries as to the personal estate, and the testator's funeral and testamentary expenses, debts, and legacies, and of his real estate and the incumbrances on it, and the following inquiry:—

An inquiry whether the defendant Thomas Acton had at the time of the deposit of the said deeds with the plaintiff M'Neillie, as in the pleadings mentioned, any claim or demand against the real estate of the said testator, and whether he has now any and what claim or demand against such real estate.

A receiver was also directed to be appointed, and further consideration was adjourned, with liberty to apply.

* In the Matter of the Trusts of COOPER'S LEGACY, and * 757
of the 10 & 11 Vict. c. 96.

Ex parte SPARKS.

1853. November 11, 12. Before the LORDS JUSTICES.

Freeholds were devised upon trust to raise 2000*l.* "by sale or otherwise," and to permit the testator's son P. to enjoy the estate "after raising as aforesaid," for his life, with trusts in remainder for P.'s children, and in the event (which happened) of P. dying without leaving issue, in trust for S. and T. in common in fee. Trusts were declared of the 2000*l.*, which, as to 1000*l.*, were for a daughter of the testator for life, and, after her death, for her children. The 2000*l.* was not raised till after the death of P., who survived S. and T., and kept down the interest of the 2000*l.* The daughter afterwards died without ever having had a child: *Held*, —

1. That the 2000*l.* was a charge upon the devised estate, and not an exception out of the devise, and, therefore, as to the above 1000*l.* sank upon the daughter's death, for the benefit of the inheritance.¹
2. That the 1000*l.* formed part of the real estates of S. and T. at their decease.

THIS was an appeal from the decision of Vice-Chancellor Wood, upon a petition presented under the Trustees Relief Act, holding that 1000*l.*, part of a sum of 2000*l.*, charged by a will on freehold estates, sank for the benefit of the persons entitled to the inheri-

¹ See Lewin Trusts (5th Eng. ed.), 124, 126; Hill Trustees (3d Am. ed.), 206; 1 Jarman Wills (3d Eng. ed.), 820 *et seq.*

tance, and constituted part of their real estate as between their real and personal representatives.

Philip Hext, by his will, dated the 25th of November, 1813, devised and bequeathed unto John Hallett and Samuel Slee, their heirs and assigns, a freehold estate, called Brandon Farm, Golden Hill, and Paul's Ground, in Somersetshire, upon trusts thus expressed: "In trust, in the first place, to raise, either by sale or otherwise, out of my said estates, or any part thereof, within one year next after my decease, the sum of 2000*l.*, and put and place the same out at interest, upon some good security or securities, and pay or apply the same in manner as hereinafter directed, also in trust, to permit my son Philip Hext. to have, hold, and enjoy my said estate, called Brandon Farm, Golden Hill, and Paul's Ground (after raising as aforesaid), with the appurtenances thereto belonging, for and during the term of his

* 758 * natural life, and from and immediately after his decease,

in trust, to receive and take the rents and profits of my said estates, and pay and apply the same from time to time towards the maintenance, education, and bringing up of all the legal children of my said son Philip, his sons, until they shall arrive to their ages of twenty-one years, and his daughters, until they shall arrive to their ages of twenty-one years (being all legal children), or days of marriage, which shall first happen, and from and immediately as the said events shall respectively take place, in trust, to divide and distribute my said estate to and amongst the children of my said son Philip, in the following proportions (that is to say), two-thirds thereof amongst the male issue, and one-third thereof among the female issue, to hold to them the respective children and issue of my said son Philip, their heirs and assigns, as tenants in common, and not as joint tenants; but if my said son Philip shall die leaving male issue only, then my will is, and I do hereby give, devise, and bequeath my said estate unto such male issue equally between them, if more than one, to take as tenants in common, and not as joint tenants; and if he shall leave female issue only, then I do hereby give, devise, and bequeath the said estate to them accordingly, to hold the same to them, their heirs and assigns, as tenants in common, and not as joint tenants; and in case my said son Philip shall happen to die without leaving issue lawfully begotten, then my will is, and I do hereby give, devise, and bequeath the said estates unto my sons Simeon and

Thomas, to hold to them, my said sons, their heirs and assigns for ever, to take as tenants in common, and not as joint tenants; and as to 1000*l.*, part of the said sum of 2000*l.* so to be raised as aforesaid, in trust, to pay the interest and produce thereof unto my daughter Mary, now the wife of Thomas Stephens, of Atherstone, so that her present or any future husband shall not inter-meddle or * have any thing to do therewith, and her re- * 759 ceipts alone shall from time to time be good and sufficient discharges to my said trustees, their executors, administrators, or assigns for the same, notwithstanding her coverture; and from and immediately after the decease of my said daughter Mary Stephens, in trust, to pay and apply the interest and produce of the said sum of 1000*l.* from time to time towards the education and bringing up of all the children of my said daughter Mary which shall be living at her decease, until they shall arrive to their respective ages of twenty-one years, and immediately upon the same happening, in trust, to divide and distribute the said sum of 1000*l.* in equal shares and proportions to and amongst all such children of my said daughter Mary as shall be then living: and as to the other moiety of the said sum of 2000*l.*, in trust, to pay the interest and produce thereof unto my daughter Elizabeth, the wife of Henry Abbott Cooper, for and during the term of her natural life, so that her present or any future husband shall not have any thing to do therewith, and her receipt and receipts alone shall from time to time be good and sufficient discharges in the law to my said trustees for the same, notwithstanding her coverture, and from and immediately after the decease of my said daughter Elizabeth Cooper, in trust, to pay and apply the interest and produce of the said sum of 1000*l.* towards the education and bringing up of all the children of my said daughter Elizabeth, until their arrival to their respective ages of twenty-one years, when I do hereby direct and order my said trustees to pay unto my said last-mentioned grandchildren the said sum of 1000*l.*, in equal shares and proportions, between and amongst all of them then living as aforesaid.” There was a residuary bequest thus expressed: “And all the rest, residue, and remainder of my messuages, lands, tenements, goods, chattels, moneys, and securities for money of what nature or kind soever, * and not hereinbefore by this my * 760 will disposed of (after paying and discharging of all my just debts and funeral expenses) I hereby give, devise, and be-

queath the same and every part thereof, unto my said sons Simeon Hext and Thomas Hext, to hold the same with the appurtenances unto my said sons Simeon and Thomas, their heirs, executors, administrators, and assigns for ever, or for all such estate, right, title, and interest as shall be therein at the time of my decease;" and the testator appointed his two sons, Simeon Hext and Thomas Hext, joint executors of his will.

The testator died on the 8th of April, 1816. Simeon Hext and Thomas Hext proved the will. Philip Hext, mentioned in the will, was the testator's eldest son and heir-at-law. His two other sons, Simeon Hext and Thomas Hext, and his two daughters, Mary Stephens and Elizabeth Cooper, also survived him.

Simeon Hext died on the 31st of December, 1829, intestate, without having been married, and without having made any disposition of or relating to the estate called Brandon Farm, Golden Hill, and Paul's Ground, or the sum of 2000*l.* directed to be raised out of that estate. He left Philip Hext, his eldest brother and heir-at-law, and also Thomas Hext, Mary Stephens, and Elizabeth Cooper him surviving.

There was not any legal personal representative of Simeon Hext.

Thomas Hext died on the 31st of July, 1831, intestate, as to the estate called Brandon Farm, Golden Hill, and Paul's Ground, and without having, by any instrument taking effect in his lifetime,

made any disposition of that estate or any share thereof, or
* 761 any disposition of or * affecting the sum of 2000*l.* Philip

Hext, the son, his eldest brother, was his heir-at-law. He, however, had made a will which was proved by Thomas Stephens, one of the executors.

Philip Hext, the son, by a codicil to his will dated the 4th of April, 1840, bequeathed the above-mentioned hereditaments unto and to the use of Charles Collins and William Allen, their heirs and assigns, upon certain trusts therein expressed.

Philip Hext, the son, died on the 5th of April, 1840.

Philip Hext, the son, during his lifetime, paid to Mary Stephens and Elizabeth Cooper, or their assigns, interest at the rate of 5*l.* per cent per annum on the respective moieties of the 2000*l.* directed to be raised out of the said estate.

After the death of Philip Hext, the son, Charles Collins and William Jefferys Allen, the trustees under his will and codicil, having signified their unwillingness to pay interest on the 2000*l.*

at a higher rate than 4*l.* per cent, Elizabeth Cooper and Mary Stephens and her four sons applied to William Hallett as the heir of John Hallett, the surviving trustee of the will of the first testator Philip Hext, to raise the 2000*l.* under the provisions of the will; and in compliance with that request, William Hallett raised the 2000*l.* by sale of a portion of the devised estate, and invested that sum in the purchase in his own name of 2058*l.* 19*s.* bank 8*l.* per cent consolidated annuities. Elizabeth Cooper died on the 5th of February, 1844, without ever having had a child.

In order to save expense the several parties claiming interests in the trust funds requested the petitioners who * were the trustees of the fund, and had paid it into Court * 762 under the Trustees Relief Act, to present the petition, on which the order of the Vice-Chancellor was made, for the purpose of having the funds and the dividends thereof paid out and distributed according to the rights and interests of parties who should appear to be entitled thereto.

The Vice-Chancellor held that the 1000*l.* belonged to the devisees in trust under the will of Philip Hext, the son. The personal representative and residuary legatees of Thomas Hext appealed.

Mr. Rolt and *Mr. Toller*, for the appellants. — First. The gift of 2000*l.* is an exception out of the devise. To hold it to be a charge is to do violence to the language of the will. The trust for the devisees is only “after raising” the sum charged. *Cooke v. Stationers’ Company*, (a) *Arnold v. Chapman*, (b) *Gravenor v. Hallum*, (c) *Sydney v. Shelley*, (d) *Henchman v. Attorney-General*, (e) *Doe v. Scott*, (g) and the cases cited in 1 Jarman on Wills, p. 303. If this be so, then the 1000*l.* fell into the residue in the character of personalty. *Jessop v. Watson*, (h) *Wright v. Wright*, (i) *Hewitt v. Wright*. (k) Now the residue is given to Simeon and Thomas as joint tenants. Thomas therefore, as surviving joint tenant, became entitled to the whole, which now belongs to his personal representatives. But if the Court should be of opinion that the 2000*l.* was only charged, still, as part

(a) 3 Myl. & K. 262.

(b) 1 Ves. 108.

(c) Amb. 643; 1 Bro. C. C. 61, n.

(d) 19 Ves. 364.

(e) 2 Sim. & St. 492.

(g) 3 Mau. & S. 300.

(h) 1 Myl. & K. 665.

(i) 16 Ves. 188.

(k) 1 Bro. C. C. 86.

* 768 of the trusts did not fail, * a conversion became necessary, and the fund had the character of personalty at the end of a twelvemonth from the testator's decease. In either view, therefore, it formed part of the residuary personalty. *Smith v. Claxton*, (a) *Tregonwell v. Sydenham*. (b)

THE LORD JUSTICE TURNER. — If both the testator's daughters had died in his lifetime without having had any children or child, this 2000*l.* clearly would not have been raisable under the trust; and therefore it cannot be regarded as an exception out of the estate, and cannot go to the appellants on that ground. There remains the question, whether, the fund being charged upon the land devised, and it having become the duty of the trustees to raise it, the 1000*l.* in question became personal estate, and passed in that character to Simeon and Philip Hext.

The Lord Justice KNIGHT BRUCE concurred.

Mr. Follett and *Mr. Rogers*, for the devisees of Philip Hext, the son. — There is nothing in the will to show that it was the duty of the trustees at all events to raise the sum. If it was not, the charge would sink, so far as it was not required for the specific purposes mentioned. *Wright v. Row*, (c) *Barrington v. Hereford*, (d) *Kennell v. Abbott*, (e) *King v. Denison*. (g) At what time did it become personal estate? Not until it was raised. But it was not raised till after the deaths both of Thomas and Simeon, and till the estate was vested in the devisees.

* 764 * When the trust failed, the resulting trust was for the owners of the estate at the time when the sum was raised. *Fitch v. Weber*. (h) The case is analogous in principle to *Wright v. Rose*. (i)

Mr. Sandys, for the trustees of the fund.

Mr. Rolt, in reply. — It is well settled that where a charge on real estate fails and enures to the benefit of the heir, if the purpose

(a) 4 Madd. 484.

(b) 3 Dow, 194.

(c) 1 Bro. C. C. 61.

(d) Cited in 1 Bro. C. C. 61.

(e) 4 Ves. 802.

(g) 1 Ves. & B. 260.

(h) 6 Hare, 145.

(i) 2 Sim. & St. 323.

of the testator wholly fails, from the moment of the testator's death the heir takes it as realty; but if the purpose for which the conversion is required subsists at the testator's death and afterwards partially fails, there, although the heir takes the money, he takes it as personalty. It is also immaterial whether the partial conversion takes place in the lifetime of the heir or not. In many of the cases there was no actual conversion. It is sufficient if a conversion become requisite for the purposes of the trust. *Smith v. Claxton*, (a) *Hewitt v. Wright*, (b) *Wright v. Wright*, (c) *Jessop v. Watson*. (d) In none of these cases had there been an actual conversion when the question arose, and yet, inasmuch as a sum was to be raised, the property was held to be personal estate in the heir. Must not the same rule apply in the case of a devisee as in the case of an heir? In the one case the law points out the person entitled, in the other the testator, but the principle is the same in both. Therefore, although there may be no express authority as to a devisee, the point must be considered as settled. Another distinction, relied upon on the other side, is founded on the direction to raise the sum "by sale or otherwise;" *but it can make no difference in principle that *765 the trustee has a discretionary power to raise by sale or mortgage, for the rights of the parties cannot be affected by the mode in which the trustee exercises his discretionary power, nor by the owner of the estate paying off the charge. It can make no difference whether the owner pays it off or a stranger advances the sum. *Wright v. Rose* (e) does not apply, for that was the case of a mortgagee who was not bound to exercise a power of sale, whereas in this case it is a trust, and not a power, and is not a trust to raise 1000*l.* at one time and 1000*l.* at another, but to raise the whole 2000*l.* at once.

THE LORD JUSTICE KNIGHT BRUCE.—The law of the Court is settled, agreeably to reason and good sense, that where landed property is given by will to one set of persons, or according to one set of limitations, but is subjected by the will to a pecuniary charge in favour of other interests, and those other interests, given by the will, do not exhaust the entire property in the money,

(a) 4 Madd. 484.

(b) 1 Bro. C. C. 86.

(c) 16 Ves. 188.

(d) 1 Myl. & K. 665.

(e) 2 Sim. & St. 323.

the charge, so far as it is not given away, sinks, for the benefit of those to whom the real estate is devised, subject to the charge. That, I apprehend, no one will dispute. But it has been said that this is not such a case, because, in the first place, the real estate in question is given to trustees, in trust, within a twelvemonth, to raise by sale or otherwise 2000*l*. A charge not directed to be paid out of income cannot well be raised, but "by sale or otherwise;" and these words mean no more than the law would attribute to a direction to raise the money by sale or mortgage, or to raise it simply. But reliance is placed upon the words "after raising;"

it was said that they mean something more than the expression "subject to." It is plain, however, on reason * 766 and

principle as well as authority, that the expression means no more than a gift of the estate subject to the charge. The testator gives this real estate in effect subject to a charge of 2000*l*., half of which is given for a purpose that has exhausted that half, and the other half for the benefit of a lady for her life, and afterwards of her children. That lady is dead, and has never had a child. It is therefore plain that the devisee of the estate subject to the charge is entitled to the benefit of the moiety of the 2000*l*., the particular interest created by the will in that moiety having ended. This point, however, was raised; it was said that as this sum might have been, and as it is contended ought to have been, raised in the lifetime of the devisees, Simeon and Thomas, it is to be taken as having been so raised, and is therefore personalty in the devisees. Now, perhaps, a sufficient answer is afforded to this suggestion by the circumstance that in point of fact no sale or conversion did take place till after the deaths of the devisees, Simeon and Thomas, as to whom alone it is material to consider the question. But although it is probable that this part of the case might be so disposed of, I am inclined to put it upon more general ground. I am of opinion, making the supposition most beneficial to the appellants, that is, supposing the money to have been raised by means of a sale during the lives of Philip and Simeon and Thomas, that it was the right of any person interested in the estate (the title of Elizabeth Cooper being removed out of the way) to have it re-invested in real estate, to give it the actual character as well as the assumed character of realty. Therefore, if Elizabeth had died, leaving Philip, leaving Simeon, and leaving Thomas surviving, it would have become the right of Philip to

insist (if he had chosen) that this money should be invested in real estate, which character had only been taken from it at the outset for a purpose that had partially failed of effect or ended. * In every possible view of the case it appears that * 767 this must be treated as part of the devised real estate. I am of opinion that the declaration made by the Vice-Chancellor is right.

THE LORD JUSTICE TURNER. — As my learned brother and the Vice-Chancellor concur, it is immaterial for me to express any opinion. I think it right, however, to state that without dissenting from them I do not feel so confident an opinion upon the case as my learned brother has expressed. I incline to his opinion, but more upon the first point than upon the second. As to the first point, the intention of the testator was that the money should be raised in order that it might be applied for the purposes which he has stated, and for those purposes only. If the purposes failed, the testator did not intend that the money should be raised at all. If both the testator's daughters had died in his lifetime without issue, the trustees could not have raised the fund. These considerations seem to me to show that notwithstanding the expression "after raising," the testator's intention was not to give the estate, less 2000*l.*, but to give it, subject to the raising of the 2000*l.*, if it should be necessary to raise it; that this is not an exception out of the devise, but a mere charge, to which the property devised is subjected. As to the second point, I confess that I feel more doubt, and it not being necessary for me to do so, I give no final opinion upon it. I am not satisfied, however, that the cases cited on the part of the appellant apply to a case like the present. In those cases the due and ordinary execution of the trust involved the conversion; but in such a case as this, of a mere charge, the conversion might or might not take place according to circumstances. The devisees, for instance, might pay the charge. Again, I am not satisfied * that in the case of a * 768 mere charge the principle of *Wright v. Rose* may not well apply, or that the question at what period the conversion took place may not be material. If the charge had never been required to be raised, there could have been no conversion. Is there, then, to be conversion before the charge is required to be raised, and is raised? If not, the conversion in this case having taken place at the time

when Philip was absolute owner, whatever question there may be whether the 2000*l.* was the real or personal estate of Philip, there can be no question as to whether it was real or personal estate of Simeon and Thomas. Looking at the case in these points of view, I do not venture to differ from the opinions of my learned brother and the Vice-Chancellor upon this point, although, as I have already stated, I give no final opinion upon it.

Appeal dismissed with costs.

* 769 * In the Matter of The GLOUCESTER, ABERYSTWITH,
AND SOUTH WALES RAILWAY COMPANY and
of The JOINT-STOCK COMPANIES WINDING-UP ACTS.

MAITLAND'S CASE.

1853. November 17, 19. December 22. Before the LORDS JUSTICES.

Where a subscribers' agreement authorizes the managing committee of a provisionally registered company to bind the members and to make regulations and by-laws, it is not beyond the powers of the committee to order that the checks of any three of them shall be sufficient, and a check so drawn will not render any one of the committee more liable than the other members of the company, without proof of the money having come into his hands.

THIS was a motion on the part of Ebenezer Fuller Maitland and Thomas Fuller Maitland, which came before their Lordships in the first instance, and sought to discharge the certificate of the Master, by which he had charged them jointly and severally with the other members of the managing committee of the company, as to Ebenezer Fuller Maitland, with the sum of 40,878*l.* 11*s.* 8*d.*; and as to Thomas Fuller Maitland, with the sum of 24,046*l.* 13*s.* 8*d.* The motion asked a declaration of the Court that Messrs. Maitland ought not to be charged with these sums.

The company was projected in the month of May, 1845, and was provisionally registered on the 26th of that month, and a managing committee was soon afterwards appointed.

The case as to E. F. Maitland stood thus: He became a mem-

ber of the managing committee on the 31st of July, 1845. At a meeting of the committee held on that day, at which he was present, it was resolved, that all moneys, checks, or bills should be received only by the chairman of the managing committee or secretary, and should be deposited with the bankers on the same day; that no payment above 10*l.* should be made unless by check, to be signed by three of the directors and countersigned by the secretary, and that the board of *directors *770 alone should have power to appoint the secretary and other officers of the company; and (the share list being closed) that certain gentlemen, amongst whom was Mr. E. F. Maitland, should form an allotment committee. At another meeting of the managing committee, held on the 7th of August, 1845, at which Mr. E. F. Maitland was also present, it was further resolved as follows: "That all checks or drafts on the respective bankers of the company shall be signed by three of the following gentlemen, who constitute the acting committee of management." Then followed the names of five or six gentlemen, and amongst them the name of Mr. Ebenezer Fuller Maitland.

An account was opened in the name of the company with Messrs. Glynn & Co., the bankers, and a copy of the last-mentioned resolution, with the signatures of the several members of the managing committee, including the signature of Mr. E. F. Maitland, was forwarded to them. The shares were allotted by the allotment committee, and letters of allotment were issued to the subscribers, which were signed by the secretary, and were in terms requiring each allottee to pay a deposit of 1*l.* 7*s.* 6*d.* to the bankers on each share.

Many of the subscribers paid their deposits into the bank, and most of those who so paid the deposit also executed the parliamentary contract and subscribers' agreement.

The subscribers' agreement provided that the persons at any time constituting the managing committee, or a majority of them, at any meeting, to consist of not less than three, should have full power and authority upon the following matters and things, that was to say, to add *to or diminish their num- *771 ber, to bind all members of the company, whether present or absent, to fill up from time to time any vacancies that might occur in their number by death or resignation of any of the members of the provisional committee, or directors, or committee of

management, to make all such by-laws, and regulations, orders, resolutions, and directions, as they lawfully could or might for their own government, and for the government and regulation of the meetings of the members of the company, and for the government of all and every their officers and servants respectively as the case might be.

On the 22d of August, 1845, Mr. E. F. Maitland, being dissatisfied with a system which had been adopted by the committee of signing blank checks, wrote to the then chairman of the company as follows: "I feel myself quite unable to attend to the duties incumbent on a provisional director, and therefore wish to withdraw, which I now do hereby." And he also on the same day wrote a private letter to the chairman, in which, after referring to the subject of the mode of drawing checks, he stated his intention to retire from the concern.

On the 24th of August, 1845, he also wrote to the secretary thus: "Having found it necessary to resign my position of a provisional director, I have done so in a letter to the chairman, and I beg, therefore, that my name may be omitted from any further prospectus of the company."

On the 26th of August the chairman wrote the following letter to E. F. Maitland: "It is my duty to lay your resignation before the board, and of course I must do so; but I cannot help saying that I do so most unwillingly, and that it would give me great pleasure if you would reconsider it."

* 772 * On the 28th of August, the solicitors also wrote to him as follows: "I beg to suggest with deference the following plan: namely, that you continue on the direction; that your son also become a director, who would perhaps attend the meetings, so as to render your presence not necessary excepting on particular occasions." The chairman also wrote to Mr. E. F. Maitland on the 28th of August, in these terms: "It has been decided by the board that a place shall be kept open in the direction for your son."

On the 3d of September, Mr. E. F. Maitland again wrote to the chairman thus: "Neither my health nor my habits will permit me to do so; but feeling a deep interest in the railway, I cannot refrain from stating that I consider it essential to its success that some alterations which I will suggest be made; I think the title should be altered, as that part of the line between Gloucester and

Hereford must, I fear, be given up. Why not call it in the next announcement the Aberystwith and Welsh Central Railway?"

After the 22d of August, 1845, Mr. E. F. Maitland never acted as a member of the managing committee nor attended any of its meetings.

The whole amount of the moneys paid into the bank to the account of the company was 40,878*l.* 11*s.* 9*d.*; but the amount paid in for deposits up to the 22d of August was only 35,369*l.* 2*s.* 6*d.* Of this latter amount there had been drawn out, up to the 22d August, 2,223*l.* 9*s.* 0*d.*, so that the balance at the bankers to the company's credit upon the 22d of August was 33,145*l.* 13*s.* 6*d.* The Master, being of opinion that Mr. E. F. Maitland had not established that he retired from the managing committee upon the 22d of August, * charged him with the 40,878*l.* * 773 11*s.* 9*d.*, the whole amount of the moneys paid into the bank.

As to Mr. Thomas Fuller Maitland the case stood thus: He was elected a member of the managing committee on the 6th of September, 1845, and took his seat at the board for the first time on the 11th of that month; his signature was afterwards, at what exact date did not appear, sent to the bankers. The balance at the bankers to the credit of the company on the 11th of September was 24,046*l.* 13*s.* 8*d.*, and the Master had charged T. F. Maitland with that sum.

In the proceedings before the Master it appeared that part of the company's moneys at the bankers were drawn out and applied in the purchase of shares in the company; and it was sought to charge both Mr. E. F. Maitland and Mr. T. F. Maitland with the moneys so drawn out and applied.

Mr. Wigram, Mr. Rasch, and Mr. Bovill, in support of the appeal, cited *The Charitable Corporation v. Sutton*, (a) *Benson v. Heathorn*, (b) *Besley's Case*, (c) *Cottle's Case*, (d) *Robert's Case*, (e) *Fenn's Case*, (g) *Carpenter's Executors' Case*, (h) *Barnside v. Dayrell*. (i)

(a) 2 Atk. 400.

(b) 1 Y. & C. C. C. 326.

(c) 3 De G. & Sm. 224.

(d) 2 Mac. & Gor. 185.

(e) 3 De G. & Sm. 205.

(g) 22 Law J., Ch. 692.

(h) 5 De G. & Sm. 402.

(i) 3 Exch. 224.

Mr. Daniel and *Mr. Hetherington*, for the official manager.—

The fact of the appellants having authorized the checks to
 • 774 be drawn renders them as liable as if they • had drawn
 the checks. Nothing in the subscribers' agreement authorized the delegation of the authority. The rule was one of the managing committee only.

They referred to *Walstab v. Spottiswoode*, (a) *Wontner v. Shairp*, (b) *Garwood v. Ede*. (c)

Mr. Wigram, in reply.

December 22.

THE LORD JUSTICE KNIGHT BRUCE. — In dealing with this matter, I will commence by supposing a case, of which the view that I take must of necessity influence, to some extent at least, my voice on the controversy before the Court.

An account is opened with a banking-house by an association, formed of a great body of persons, united for the purpose of an adventure or undertaking, or by persons duly acting, in that respect, on behalf and by the authority of the association. The account is opened and kept in the name of the association, of which association, however, it is one of the laws that its affairs shall be managed by five delegates, deputies, or agents, selected from the whole body, and that checks upon the banking-house may be drawn by any three of the five, but not otherwise, that is to say, each check to have three signatures, and the signatures to be those of some three of the five.

Can it be said that on the undertaking or adventure proving unsuccessful, and the consequent liquidation of its affairs, the five are, or any one of them is, more or otherwise chargeable with any sum standing or that ever stood to the credit of the account
 • 775 at the banking-house • than any other member of the association? I apprehend not. For any check drawn, those who drew it, or personally participated in the transaction of drawing it, may be liable to account. That is a different matter. So, for any other dealing with the banking-house, those who authorized or personally participated in it may be responsible. That, too, is a

(a) 15 M. & W. 501.

(b) 4 C. B. 404.

(c) 1 Exch. 264.

different matter. So, likewise, is responsibility created by gross negligence or any other improper conduct.

A question, however, in the present instance arises, whether the resolution of the managing committee of the association, whose affairs are before us, that the banking-house should pay checks drawn by any three of the committee, and countersigned by the secretary, was a proper one, was one in its nature binding on the entire association. It has been, in effect, conceded as undeniable that such a course was in conformity with the ordinary and usual course and practice in all similar cases, and we may, I think, reasonably hold, having regard to the terms of the subscribers' agreement, that this resolution was within the general powers of the committee, and bound the association. It seems, too, that so the matter was argued on each side before the Master, as well as treated by the Master himself. If thus far I am correct, it may not be important to consider whether the resignation or retirement of Mr. Maitland, the elder, was complete and effectual or not. I am of opinion, however, that it was not provisional nor conditional, was authorized by the terms of the constitution of the association in question, and was complete and effectual, whether accepted or not accepted by any other person or body of persons, inasmuch as it was duly communicated to the persons to whom, and in the time and manner in which, it was necessary or right that it should be communicated; nor can it, in my opinion, be truly alleged * upon the evidence that it was recalled. I am • 776 satisfied, on the whole, that from the 22d of August, 1845, Mr. Maitland, the elder, did wholly, for every purpose and in every sense, cease to be a member of the committee of management.

There is, as to him, a further question, whether he ought upon the present evidence to be considered as having directed, authorized, or been directly or indirectly privy to, the withdrawing, or the application of the whole or any part of the 16,000*l.* and a fraction applied for the purpose of an operation, called by professors, as *Mr. Wigram* tells us, "rigging the market." And I am of opinion that he ought not; a conclusion at which I have arrived not without giving full attention to the statements on oath made by Mr. George Price Hill, by the secretary, and by Mr. Maitland, the elder, respectively. On the whole, therefore, though with unaffected respect for the judgment from which I am differing, my conclusion is, that a case has not been shown for charging or debiting Mr.

Maitland, senior, with any sum or amount whatever, unless possibly some part or the whole of the amount drawn out of the banking-house before the 23d of August, 1845; a point which must be open to investigation before the Master, as must the consideration of any further evidence, if any shall be adduced, as to the 16,097l.

My opinion, likewise, upon the present materials, with regard to Mr. Maitland, junior, is, that a case for charging him is not established; but it is possible that, as to such or some of such checks and dealings as were drawn and took place after he became a director or member of the committee, he ought to be charged.

Mr. TINNEY will of course consider this, if asked to do so.

* 777 And our order discharging the two debits in dispute * ought, I think, to be expressly without prejudice to any case that in either of the respects that I have mentioned may be made against both or either of the appellants before the very able and learned Master, whose view of the materials now before us I have not found myself able to take.

THE LORD JUSTICE TURNER. — There are two points which call for our decision in this case: first, whether these parties ought to have been charged with the sums in question; and, secondly, whether the Master is right in the conclusion at which he has arrived, that E. F. Maitland has not proved his retirement from the committee of management, upon the 22d of August, 1845. The first of these points applies to both the parties, the latter to E. F. Maitland only; and I propose therefore, first, to consider the question of charge.

It does not appear in this case that either of the parties ever received from the bankers any part of the moneys with which he is charged; and if, therefore, the charge against either party is to be maintained, it must be upon the ground that he is accountable for all moneys paid into the bank, whilst he was a member of the managing committee, and it is, indeed, upon this principle the Master has proceeded. The question therefore involves, to a great extent, the liabilities of directors and managers of joint-stock companies, and it is important that we should state clearly the grounds of our opinion upon it. The liability of trustees and directors and managers of joint-stock companies, standing in the position of trustees, must, as I apprehend, in all cases, depend upon the nature and constitution of the trust under which they

act. If they have undertaken the trust upon any special terms or conditions, those terms * or conditions must be * 778 attended to in determining any question upon their liability.

Before, therefore, these parties can be charged, it must be considered what was the nature and constitution of the trust which they and the other members of the committee of management of this company undertook. Up to the time of the deposits being paid there was no trust fund. When the deposits came in, they came in upon the terms of the subscribers' agreement, which the allottees executed or were bound to execute. It is to the subscribers' agreement, therefore, we must look for the terms on which this trust was constituted. By that agreement power was given to the majority of the managing committee at any meeting to bind all the members of the company, and to make by-laws. [His Lordship read the clause.]

These parties, therefore, must be considered to have accepted the trust upon the terms of their being invested with those powers. Was it, then, beyond their power to order that the checks of any three of them upon the bankers should be paid? I think it was not. The words of the agreement are sufficiently comprehensive to give that power, and the nature of the undertaking rendered it necessary for them to exercise it. How could the affairs of these large companies be carried on if every check drawn upon the bankers was required to be signed by every member of the managing committee? That such a power might be created for a fraudulent purpose, and that, if it was so created and exercised, all parties implicated in the fraud would be made liable, there can be no doubt; but in this case there is no suggestion of fraud, and, on the contrary, it was fairly admitted that it was usual in these companies to authorize three of the directors to draw upon the bankers.

It being, then, in the power of the committee of management * to make a regulation that any three of them might * 779 draw upon the bankers, this regulation when made by them became part of the terms on which they accepted the trust; and the shareholders, therefore, stand in this position, that they have appointed six trustees, with power to any three of them to deal with the trust funds. Can they then charge any trustee without proof of the funds having actually come into his hands? I think not. It is like the case of executors, where one cannot be charged

with the receipts of the other, because the law gives to each the power to receive.

It was said, and I was at the time much struck with the argument, that the drawing of the money from the bank must have been the act of some of the managing committee; and that it was the act of some by the authority of all; and there is no doubt, that any trustee, who, without the sanction and concurrence of his *cestui que trust*, permits trust funds to come into the hands of his co-trustee, must be answerable for those funds;¹ he cannot delegate to another the trust which is reposed in himself. But it is not less clear that if the *cestui que trust* has authorized the funds to be paid over to or dealt with by the co-trustee, he cannot afterwards charge the trustee who has permitted the funds to be so dealt with upon the faith of that authority; and that is the case here, for the subscribers to this company gave power to the trustees to make the regulation enabling any three of them to draw upon the bankers, and must, therefore, be bound by it.

Again, it was said that this regulation was made before the subscribers' agreement existed; but surely it was not necessary for the managing committee, having made the regulation, to reaffirm it in terms, after the agreement was signed; it was suffi-

* 780 cient that they acted * upon it. The conclusion, therefore, at which I have arrived at this part of the case is, that upon the facts as they stand, these parties ought not to have been charged with the sums in question.

The remaining question is, whether E. F. Maitland has sufficiently proved his retirement from the committee of management upon the 22d of August, 1845. I am of opinion that he has; but the deed prescribes no form of retirement. It is clear upon the evidence, that E. F. Maitland never did act after the 22d of August, and that on that day he communicated to the chairman of the company that he was unwilling to act. It was said that this communication was not laid before the board. I am by no means satisfied that this step was necessary for E. F. Maitland's complete retirement; but, assuming it to have been so, I am of opinion that the evidence before us is sufficient to show that the communication was laid before the board.

It was also said, that E. F. Maitland, in order to his complete

¹ See *Styles v. Guy*, 1 M'N. & G. 422, 430, and cases in n. (2), 432, 433; *Lewin Trusts* (5th Eng. ed.), 224, 225.

retirement, should have withdrawn his name from the bankers; but he could not draw without the concurrence of the other members of the managing committee or some of them, and I think that the duty of communicating to the bankers that he had ceased to have authority to draw rested with them as having charge of the company's funds, and not with him.

The order, therefore, will be to declare that E. F. Maitland and T. F. Maitland, respectively, ought not, upon the evidence before us, to be charged with the sums of 40,878*l.* 11*s.* 9*d.* and 24,046*l.* 13*s.* 8*d.*, with which they respectively stand charged by the Master; and that E. F. Maitland ceased to be a member of the managing committee of the company upon the 22d August, 1845; * but this is to be without prejudice to any case that may be * 781 made against them or either of them before the Master, upon any additional evidence which may be adduced before him.

HALL v. ROBERTSON.

1853. November 19, 25. Before the LORDS JUSTICES.

A testator gave 5000*l.* to be invested in the names of trustees for the benefit of a tenant for life, and, at his death, the principal to his son and unmarried daughters as he might by will direct, and, failing such direction, to them equally: *Held*, that “unmarried daughters” meant those who were unmarried at the date of the codicil.¹

THIS was an appeal from the decision of Vice-Chancellor STUART. The question turned upon the construction of a codicil to the will of Mr. William Gill Paxton, which was as follows:—

“I give to Reverend George Dinely Goodyar five thousand pounds, to be invested in the names of my trustees for his benefit during life, and at his death the principal to his son and unmarried daughters as he may by will direct, and, failing such direction, to them equally.”

¹ See 1 Jarman Wills (3d Eng. ed.), 489, 2 *ib.* 142; Pratt v. Mathew, 8 De G., M. & G. 522.

The residue was given in the same way, except that, as to the residue, the testamentary power conferred on Mr. Goodyar was general and absolute. But it was only with a legacy of 5000*l.* that the question arose.

The facts were that Mr. Goodyar, the legatee, died in the testator's lifetime, after the date of the codicil. He was a widower when the codicil was made, and had, at that time, a son and four daughters, and no other child living. All five survived the testator. Of the daughters, one and only one had been married at the time when the codicil was made. Her husband was then living, and was so when the testator died. Another daughter married after the codicil, but in her father's lifetime. She was, however, a widow at his decease, and so continued at the decease of the *782 testator. Another daughter married *also in her father's lifetime. Her husband was still living. The remaining daughter had not married. Mr. Goodyar continued a widower from the time when the codicil was made to his death.

Upon the petition of the son, and the daughter who had never married, the Vice-Chancellor decided that they were entitled to the entire trust fund.

The daughter who was a widow at the testator's death, and the daughter who married after the date of the codicil, and whose husband was still living, with her husband, appealed from the decision.

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Mr. Roupell and *Mr. Speed*, for the widow. — This is a gift to individuals, and not to a class: *Havergal v. Harrison*; (a) as is manifest from the use of the word "son" in the singular number. The word "unmarried" means having no husband at the testator's death. *In re Norman's Trust*. (b)

They also referred to *Maugham v. Vincent*, (c) *Doe v. Rawding*. (d)

Mr. Leach, for the daughter who married after the date of the codicil and her husband, contended that the word "son" in the singular number showed that the codicil spoke at its date. He cited *Garratt v. Niblock*. (e)

(a) 7 Beav. 49.

(d) 2 B. & A. 441.

(b) 3 De G., M. & G. 965.

(e) 1 Russ. & Myl. 629.

(c) 4 Jur. 452.

Mr. Bacon and *Mr. Bird*, for the respondents. — There is no sufficiently clear intention to alter the rule as to the time at which the codicil is held to speak. On the contrary, the most probable intention to ascribe to the testator is one to provide only for daughters, who, at * his decease, should not have been * 788 already provided for by marriage.

Mr. Speed, in reply.

November 25.

The Lord Justice KNIGHT BRUCE, after reading the codicil, said that the validity of the bequest was not in dispute, but only the construction of the word “unmarried,” which, it had been agreed, could not be rejected. Some meaning must be given to it. The question was, what?

His Lordship then stated the facts as to the family of G. D. Goodyar, and, after adverting to the fact that Mr. Goodyar was a widower at the date of the codicil, and remained so to his death, continued as follows:—

This last fact, however, is immaterial, except as it excludes the possibility of any claim to participation in the legacy being without or with foundation made by any person other than the five or some of the five children whom I have mentioned. But I am of opinion that if Mr. Goodyar had married after the codicil, and had at his death left daughters of the marriage so contracted, those daughters, though surviving and unmarried at the death of the testator, could not successfully have claimed any part of the 5000*l*. The codicil which says “son,” not “sons,” read with a knowledge of the facts existing when it was made, appears to me to render that conclusion inevitable. What, however, did the testator mean by the expression “unmarried daughters”? The Vice-Chancellor thought that in this particular instrument the expression meant daughters never having married. The point, however, whether by “unmarried daughters” were intended the daughters unmarried when the codicil was made (whether marrying or not marrying afterwards), seems to have been scarcely or not at all touched * before his Honor, who, without the assistance of * 784 . an argument upon it, decided that by “unmarried daughters” were intended only daughters unmarried at the testator’s

death, or unmarried at the death of the survivor of him and Mr. John D. Goodyar. I conceive, however, that by the term "unmarried" as used in the codicil before us, the testator pointed to persons unmarried at the time of making it. The bequest, as I have said, was in my judgment plainly meant not to extend beyond John D. Goodyar and his children living when it was made, a time at which I repeat three only of his four daughters were unmarried.

The expression, therefore, was sensible and proper, and not superfluous, if the testator meant by it to describe a state of things existing when he used it. But, if he so meant, is his language in this respect grammatical, agreeable to idiom, and consistent with the other language of the testamentary dispositions? I apprehend that it is. And if I am further asked whether so to read the codicil is, in my opinion, to ascribe to him an intention which upon the facts known to us is more reasonable and probable than any different reading would attribute to him, I answer that also affirmatively. It was impossible for him at the time of making the codicil to know whether any of the unmarried daughters would marry well or ill, or at all, or to be ignorant that marriage and affluence do not always accompany each other. He probably, or certainly, knew at that time that Mr. Goodyar had then a son and four daughters living, and that of the daughters one and only one was at that time married, as to whom it may fairly be taken to have been the testator's opinion that she did not require or ought not to have any testamentary provision from him, though his particular reason may not be apparent. And if he had

* 785 shown with sufficient distinctness an intention that * neither of her sisters, who might under whatsoever circumstances happen to marry between the date of the codicil and the death of the survivor of her father and himself, should participate in the legacy, the intention so expressed would perhaps have been legal, and prevailed. But so singular an intention (singular, I mean, if our knowledge is as full as it ought to be) seems to me neither distinctly nor at all expressed by him.

Upon the words "to them equally" I do not lay much stress. They are certainly, however, not favourable to *Mr. Bacon's* contention. But any testamentary appointment or apportionment by Mr. Goodyar, had he survived the testator, could perhaps only, as to daughters or any daughter, if the argument of *Mr. Bacon* is

well founded, have been contingent on the daughter or daughters not marrying in Mr. Goodyar's lifetime. The power, however, given to him might, upon the contrary theory, have been very convenient and useful in the case, for instance, of a daughter marrying so well in the vulgar sense of the expression as to render any part of the 5000*l.* a matter of indifference to her. On the whole, thinking, as I have said, that the testator did not mean to exclude, in any event, any one of the daughters not married when the codicil was made, I must hold Mrs. Tylden entitled to a fourth, but no more than a fourth, of the 5000*l.*

THE LORD JUSTICE TURNER. — The only point in this case on which I think it necessary to give any opinion is, at what time the testator intended the description of unmarried daughters contained in the codicil to apply. If he intended it to apply at the date of the codicil, it is the duty of the Court to carry out that intention; and, in that case, the question whether the daughter who had married and become a widow between the date of the codicil and the death of * the testator, was an unmar- * 786 ried daughter within the meaning of the codicil, does not arise. The language of the codicil exactly meets the circumstances as they stood at the date of it; for G. D. Goodyar had then a son, a married daughter, and several unmarried daughters; and the description "unmarried daughters," therefore, well applies to those who were unmarried, in contradistinction from the one who was at that time married.

This, however, does not decide the question, for the language of the codicil might have been intended to apply to circumstances as they should stand at the death of G. D. Goodyar, or of the testator. It might have been intended to mean son, and such of the daughters as should be unmarried at either of those periods. We must, therefore, look further into the instrument to find out, if we can, the testator's intention; and our first endeavour must be to discover what was then immediately present to the testator's mind. He has not, I think, left us in doubt as to this; for he has mentioned G. D. Goodyar's son, and it is clear that he meant the son then living; no other son could take. As to the son, therefore, he was referring to circumstances then existing; and I think it would be a strange construction of an entire disposition to treat the testator as in one part of it referring to circumstances then

present and existing, and in another part to circumstances as they might stand at a future time. Again, this testator has given the fund to the son and unmarried daughters of G. D. Goodyar as he shall by will direct, and if all his daughters happened to be married at his death, the power of appointment would for all practical purposes be gone, there being but one object remaining, — the son. Appointments, too, in favour of unmarried daughters would fail, if they happened to be married at the death of G. D.

Goodyar. Could such have been the testator's intention?

* 787 Then, failing G. D. * Goodyar's direction, the fund is to go equally. Does not this import that he contemplated a division at all events? But, unless the construction is made to refer to the date of the codicil, there might evidently be circumstances in which there could be no division, for all the daughters might become married. These considerations satisfy me that we must apply the construction to the date of the codicil, and that the Vice-Chancellor's decision must be varied accordingly.

RHODES v. IBBETSON.

1853. December 8. Before the LORDS JUSTICES.

In a contract for the sale of leasehold hereditaments, it was agreed that the vendor should produce a good and marketable title commencing from the freeholder, but that no title should be called for prior to the lease. In the course of the investigation of the title, it was stated that the lease had been granted in pursuance of a prior contract, the benefit of which had been the subject of a security, which was by the same statement represented as having been satisfied: *Held*, —

1. That the purchaser was entitled to investigate the dealings with the contract prior to the lease being granted.
2. That stipulations as to title in a contract between a vendor and a purchaser are to be construed favourably to the latter, though not contained in conditions of sale exclusively prepared by the vendor.

Mode of appealing from the certificate of a Judge's chief clerk made in conformity with an opinion expressed by the Judge.

THIS was an appeal from the certificate of the chief clerk of the Master of the Rolls, on a question of title in a specific performance suit instituted by the vendor.

The contract for sale was dated the 22d of October, 1852, and was made between the plaintiff of the one part and the defendant of the other part. It was as follows: —

“First, the said George Rhodes, for himself, his executors and administrators, agrees to sell and dispose of his whole interest in an improved ground rent for the whole of his term in ten houses and piece of ground (as shown in plan), situate on the south side of Edward Square, Caledonian Road, aforesaid, numbered one to ten inclusive, * to hold to the said Frederick Ibbet- * 788 son, his executors, administrators, and assigns, for a term of ninety years from the 25th day of March, 1850, at the yearly rent of 20*l.*, subject to underleases, for a term of sixty years from the 29th day of September last, at the net annual rent of 102*l.* (apportioned on each house and the aforesaid piece of ground) for the sum of 1350*l.*, which improved ground rents amount together to 82*l.* per annum, payable as from the 29th day of September last, and as the houses are not complete, half the purchase-money to be paid on executing this present agreement, and the other half (being 675*l.*) to be paid with interest at the rate of 5 per cent per annum in the proportion of 67*l.* 10*s.* for and as each of the said ten houses is completed, such completion to be certified by the purchaser’s surveyor. And the said George Rhodes to produce a good and a marketable title to the premises commencing from the freeholder at his own expense; but no title, or evidence of title, shall be required to be produced or authenticated anterior to the date of the lease granted by Daniel Sutton, Esquire, to the said George Rhodes. And the said Frederick Ibbetson hereby agrees to purchase the aforesaid property for the said sum of 1350*l.*, upon the terms and conditions as aforesaid, and execute an assignment from the said George Rhodes, and other necessary parties (if any), to pay him the costs of the said George Ibbetson; and such assignment to be prepared by the solicitor of the said Frederick Ibbetson, and to contain all usual covenants and clauses. And it is agreed between the parties that the several underleases of the premises and counterparts thereof shall be prepared by the solicitor of the said George Rhodes, at the expense of the sublessee, prior to the execution of the said assignment to the said Frederick Ibbetson.”

The vendor’s solicitor, on delivering the original abstract * of * 789

title, sent to the purchaser a letter dated the 22d of February, 1853, which referred to a mortgage of an agreement, in pursuance of which the lease had been granted. He stated that this mortgage (which was not noticed in the abstract) had been released.

The purchaser's solicitor, by a letter dated the 1st of March, 1853, applied for an abstract of the mortgage and release. The vendor's solicitor thereupon sent an abstract of the release of the mortgage, in which recitals of other deeds were recited.

On the application of the purchaser the vendor's solicitor delivered without prejudice an abstract of the recited deeds.

Further requisitions being then made and resisted, the present suit was instituted, and was upon the hearing adjourned to chambers for an investigation of the plaintiff's title. On the 22d of July, 1853, the question of title was argued before the Master of the Rolls, who decided that the defendant was not entitled to require any further abstract of title.

The matter was thereupon referred back to chambers, and the chief clerk on the 7th of November, 1853, made his certificate, which was approved by his Honor on the 12th of November, 1853, certifying that a good title was shown on the 11th of April, 1853.

On the 17th of November the defendant's solicitor applied by summons to the Master of the Rolls, in chambers, to vary the certificate. On this summons the following order was made:—

“ Upon the application of the defendant, that the certificate * of his Honor's chief clerk made in this cause, dated * 790 the 7th day of November, 1853, and filed on the 12th day of November, 1853, might be discharged, or that the same, so far as it found that a good title could be made to the property therein mentioned or referred to, and that the 11th day of April, 1853, was the time at which it was shown that such good title could be made, might be varied by finding that a good title to the said property cannot be made, or that it has not been shown that such good title can be made. And upon hearing the solicitors for the said defendant and for the plaintiff, his Honor did not think fit to make any order on the said application.”

The appeal was by way of motion that the certificate of the chief clerk of the Master of the Rolls, dated the 7th of November, 1853, might be discharged, or that the same, so far as it found that

a good title could be made to the property therein mentioned or referred to, and that the 11th day of April, 1853, was the time at which it was first shown that such good title could be made, might be varied by finding that a good title to the said property could not be made, or that it had not been shown that such good title could be made, and that the order of the Master of the Rolls dated the 17th of November, 1853, whereby his Honor declined to make any order on the defendant's application to the above effect, might be reversed or varied.

Mr. Roundell Palmer and *Mr. Bagshawe*, for the motion. — The contract entitles the purchaser to a title commencing from the freeholder. As there were dealings with the equitable term before the legal one was granted, the purchaser is entitled to have a full abstract of all the * deeds relating to the * 791 equitable title. The subsequent words of the agreement may be relied upon as abridging this right, but they are at the utmost ambiguous, and must be construed favourably to a purchaser who knew nothing about the state of the title. Any one reading the contract without such knowledge would understand it as merely precluding him from calling for the freehold title. In *Symons v. James*, (a) one of your Lordships said, "If a vendor means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms the most clear and unambiguous. And if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor."

Mr. Lloyd and *Mr. Bilton*, for the plaintiff. — The word "lease" means a legal lease. There is no such thing as an equitable lease, and the contract is express that no title prior to the lease is to be called for. The argument on the other side must go to the extent of striking these words out of the agreement. The same rules of construction are not to be applied to a contract between vendor and purchaser, which must have been settled on behalf of both, as may be applicable to conditions of sale which are prepared by the vendor alone.

(a) 1 Y. & C. C. C. 487-490.

THE LORD JUSTICE KNIGHT BRUCE. — This is a question upon the construction of a clause in a contract for the sale of ground rents which is thus : —

[His Lordship read it.]

- * 792 * The case assumed for the purpose of the argument is, that the freeholder had entered into a contract to grant a lease to the plaintiff, and that this contract had been the subject of various dealings, and that after these dealings had taken place the lease was granted. *Mr. Lloyd* did not dispute, and there is no doubt, that if the matter had rested there, the purchaser would have had a right to be satisfied, as to these intermediate dealings, with the contract for the lease ; but *Mr. Lloyd* contends that the sentence which begins with the words “ But no title,” modifies the former part of the contract. My opinion, however, is, that if any thing was intended by this sentence in diminution of the rights of the purchaser, beyond the extent to which they were diminished by the former part, such an intention is not expressed with sufficient clearness. In my judgment the purchaser has a right to understand the words in the sense for which *Mr. Palmer* and *Mr. Bagshawe* contended. Besides the remarks in *Symons v. James*, that have been cited, there are some in another case, (a) not referred to at the bar, which are thus : “ I do not greatly admire the case on either side, but I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness. If he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself.” I abide by what I then said, and these observations appear to me to apply to the present case. I think that the plaintiff cannot enforce the contract against the purchaser unless he will submit to have it construed as is now contended on behalf of the purchaser. It
- * 793 is * another question, whether the purchaser or the vendor is entitled to be relieved from the contract.

(a) *Seaton v. Mapp*, 2 Coll. 562.

THE LORD JUSTICE TURNER. — The sole question now to be decided turns on the construction of the contract. If the contract had stopped short at “commencing from the freeholder,” there could not be any doubt as to its construction. But it is said, the previous part of the clause is qualified by the latter part, commencing with the words “but no title.” I think that this is a qualification amounting to a representation by the vendor that the leasehold title does commence with the lease. Nothing appears to me more important than that vendors should be held bound to express clearly and distinctly the limitations which they intend to impose on the purchaser.

It was contended by *Mr. Lloyd* that there was a difference in this respect between contracts and conditions of sale; but, in my opinion, there is no difference between the two as to the duty of the vendor to state fully the condition of the title, if he intends to qualify the ordinary legal rights of the purchaser. I entirely assent to the doctrine laid down in the passages cited from *Symons v. James* and *Seaton v. Mapp*. If the vendor insists upon having the contract specifically performed, the cause must go back to the chief clerk, with a declaration expressing our view of the case.

The following were the minutes of order: “If the vendor elects to have the contract performed, the cause to go back to the chief clerk with the declaration that, as between the vendor and purchaser, the agreement is to be construed as if the words ‘but no title or evidence * of title,’ down to the words ‘to * 794 the said George Rhodes,’ inclusive, were not contained in it. Discharge the certificate and the order of 17th November, 1853. If the plaintiff desires to abandon the contract, the cause to be put in the paper on the 19th of December, on the question whether he is entitled to abandon it, and, if so, on what terms as to costs or otherwise.”

The cause was not again mentioned, the vendor having (it is believed) elected to have the contract performed on the terms above mentioned.

THOMPSON *v.* PARTRIDGE.

1853. December 8. Before the LORDS JUSTICES.

After the time for closing the evidence in a cause has expired, the Court will not, under the 15 & 16 Vict. c. 86, § 38, extend it, except under special circumstances.

Both parties may abstain from filing their affidavits till immediately before the expiration of the time fixed for closing the evidence.¹

THIS was an appeal from an order of Vice-Chancellor STUART, extending the time within which the evidence was to be closed.

The suit was one for an account of partnership dealings, and the evidence was by affidavit.

The time for closing the evidence had been enlarged from time to time on the application of the plaintiff, who at length filed his affidavits in November, 1853, two days before the expiration of the extended time. The defendant then moved for a further extension of the time for filing his affidavits, on an affidavit that he had had no opportunity of seeing the plaintiff's affidavits until shortly before the time of the application.

The Vice-Chancellor thereupon made the order, under ap-
* 795 peal, giving the defendant liberty to file affidavits until * the 10th of December, the evidence to be closed on the 21st of that month.

Mr. Daniel and *Mr. Selwyn*, for the appellant. — No special circumstances exist in this case to take it out of the general provision of the Chancery Amendment Act; and, if this order shall be affirmed, the Court cannot, on any future occasion, refuse to enlarge the time. Such a practice, however, would be very unfair to plaintiffs, and would give defendants an undue advantage; for the defendant will, if this practice be upheld, always postpone filing his affidavits till he has seen those of his adversary, who will have no counterbalancing advantage. The rule was most strict in the old practice, that the parties were not to see one another's evidence till publication passed. The new Act was not intended, without necessity, to interfere with this practice. Here the defendant did

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 890.

not intend to file affidavits, and it was only after he had seen the plaintiff's affidavits that he thought of doing so. It is one of the reasons for the disuse of claims, except in very simple cases, that, in any other, counter affidavits may be filed without limit, and it was never intended to subject suits commenced in a more formal way to the same inconvenience. In a late unreported case before Vice-Chancellor Wood, his Honor expressed his opinion that the legislature did not intend by the 38th section of the Chancery Amendment Act to sanction any such practice.

Mr. Malins and *Mr. Piggott*, for the defendant. — The order as made meets the substantial justice of the case. The plaintiff's case on the bill did not require to be met by evidence on the part of the defendant; but when the plaintiff's affidavits were filed, only two days before the extension of the time (extended at the plaintiff's application), they were such as required to be answered, * and if the defendant had not been allowed to * 796 enter into evidence the result would have been that the case would have come on in an imperfect state, and must have stood over for inquiries. The time allowed by the Act is to enable the defendant to answer the plaintiff's case, and if the plaintiff does not file his affidavits until the last moment, justice requires time to be given to the defendant. The old practice as to depositions has been universally condemned, and can afford no guide for that now to be pursued. At *Nisi Prius* the plaintiff opens his evidence, and the defendant is not required to answer it before he knows what it is. The new practice must be the same as has always been adopted in Chancery where affidavits have been admitted.

Mr. Daniel, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The Act of Parliament says, in the 38th section, that, after the time fixed for closing the evidence, no further evidence is to be receivable without special leave of the Court, previously obtained for that purpose. And my construction of the Act is, that by "without special leave" is meant "without leave granted on special grounds." If that be the true interpretation, it is impossible to say here that the affidavit on behalf of the defendant in support of this application does afford any special grounds at all. It is an affidavit rather bearing against

his application than in favour of it. If a special case can be made, the Court will be ready to hear it. At present, my opinion, I repeat, is, that no special case has been made. I feel the less reluctance in thus deciding, because the Court may hereafter direct an inquiry upon any reasonable suggestion that evidence has come on either side by surprise. This question has arisen on a system almost entirely new; a system containing much that is
 * 797 beneficial and * useful, but still one of novelty, and it cannot therefore be matter of surprise that different minds should have viewed it differently.

THE LORD JUSTICE TURNER. —The sole ground on which this motion can be rested is, that the plaintiff's affidavits have been filed so late that the defendant had not had an opportunity of answering them. Now let us consider under what circumstances the motion is made. The defendant has by the bill had distinct notice of the case to be made against him. He therefore has, when issue is joined, the means of making his own case to meet the case on the other side; and it is clearly the object of the Act of Parliament and of the orders, made under it, that each party should be bound, independently of the other, to make out his own case. It was never meant by those who framed this Act of Parliament or these orders that a suit should be put in such a position as that there should be reply upon reply upon the affidavits to be filed on one side or the other, or that opportunity should be afforded of tampering with the witnesses on one side or the other, by making it incumbent on either party to file his affidavits within a limited time. The old rule, upon an application after publication passed, for an order further enlarging it, was to require an affidavit to be made by the defendant that he had not seen the depositions of the witnesses examined on the part of the plaintiff. There was no intention by the recent Act or the orders made under it to alter that rule. Their language does not require it to be altered, but merely gives the Court power to enlarge the time for closing the evidence, and says that no further time shall be given without special leave of the Court. Cases may arise under which it may be necessary or right to extend the time, and thus to admit further evidence; but in those cases special
 * 798 grounds must be * shown. The affidavit filed in the present case raises no special case to induce the Court to interfere.

I am of opinion that this order must be discharged ; but as a difference of opinion has arisen upon a system entirely new, we think that the costs of both applications should be costs in the cause.

CHESTER v. ROLFE.

In the Matter of GEORGE RUTTER, a Lunatic.

1853. December 20. Before the LORDS JUSTICES.

A commission *de lunatico inquirendo* was issued against a man, on the petition of his wife, and he was found lunatic, and died : *Held*, that if the proceeding was for his benefit, the solicitor employed in it by the wife was entitled to institute a creditor's suit in respect of his costs.

A QUESTION had arisen in the above cause, which came before the Master of the Rolls upon an administration summons, and his Honor desired the question to be mentioned to their Lordships, being one that related to a matter in lunacy and arising under the following circumstances : —

On the 8th May, 1852, the wife of Mr. George Rutter instructed Mr. Chester, a solicitor, to issue and prosecute a commission in lunacy against her husband. Mr. Chester, pursuant to such instructions, prepared a petition for a commission in which the wife was the petitioner. The commission issued, and, under it, Mr. Rutter was found a lunatic, or person of unsound mind, and incapable of conducting his affairs.

It had been at first intended to make Mr. Rutter's children petitioners, but information was obtained at the office in lunacy that if the wife was not the petitioner, she must be served with the petition, which would occasion additional expense.

Pursuant to an order of their Lordships made on the * 17th of November, 1852, in the matter of the lunacy, on * 799 the petition of Mrs. Rutter, Mr. Chester's bill of costs therein was taxed at 15*l.* 18*s.* 11*d.*, which included 19*l.* 3*s.* 4*d.*, the costs of the order confirming the Master's report, appointing a committee of the estate and person of the lunatic, and directing

such committee to pay to the wife of the lunatic 20*l.* per annum by monthly instalments. The taxed bill of costs also included 7*l.* 19*s.* 6*d.*, being the amount of the costs of the heir-at-law and next of kin on the petition. The lunatic died in 1853.

Mr. Chester delivered his bill of costs to the lunatic's executors, requesting payment, and, on their failing to pay, he took out a summons against them for the administration of the lunatic's estate as a creditor in respect of the amount of his bill.

In opposition to the summons the defendants made affidavits stating that the commission had not been of advantage to the lunatic, and that when one of them was informed of the intention to apply for the commission, he urged upon the lunatic's wife and family the impropriety thereof, on the ground that the lunatic's property was very small, and that the nature of it was such that an arrangement could easily be made for its protection and the care of the lunatic without the aid of a commission.

Mr. Anderson and Mr. Collins, for the plaintiff. — The proceedings were taken for the benefit of the lunatic, by the instructions of his wife, and the costs of them constitute a debt against his estate. *Ex parte Price*, (a) *Williams v. Wentworth*, (b) *Wentworth v. Tubb*, (c) *Barnesley v. Powell*. (d)

* 800 * *Mr. Busk*, for the executors. — There was no debt due from the lunatic, who was incompetent to contract any. Under the commission your Lordships might have allowed the costs, if the proceedings had been for the lunatic's benefit. We deny them to have been so here. But if they had been, still they are no debt to be enforced against the lunatic or his estate. The plaintiff's remedy is against his employer. The cases cited do not apply. In all of them there was a fund in the lunacy or in Court, upon which the solicitor had a lien by reason of its having been recovered by his diligence. Could an action have been brought by the plaintiff against the lunatic, if he had recovered, or against his committee? The circumstance that the petitioner for the commission was a *feme covert* will not make the debt one due from the lunatic. The plaintiff should have seen that she had a next friend in the proceedings who could pay the costs.

(a) 2 Ves. Sen. 407.

(c) 1 Y. & C. C. C. 171; 2 *ib.* 537.

(b) 5 Beav. 325.

(d) Amb. 102.

[The Lord Justice KNIGHT BRUCE said he believed that it was not usual in such cases to have a next friend. His Lordship consulted the registrar in lunacy, who stated that it was not the practice to sue for a commission by a next friend.]

Mr. Anderson, in reply. — If the proceeding was for the benefit of the lunatic, the costs of it constitute a good demand as against his estate. *Williams v. Wentworth*. (a) The expenses are necessities supplied to the lunatic, and, in the event of the death of the lunatic, are payable out of his real or personal assets. *Wentworth v. Tubb*. (b) Although the solicitor may not be able to bring an action * against the lunatic for such * 801 costs, the committee has a lien on the lunatic's estate for them, and the right of the client is that of the solicitor. *Barnesley v. Powell*, (c) *Ex parte Price*. (d) The wife of the lunatic was sufficiently his agent to take steps for his protection.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the petition for the commission was that of the lunatic's wife. How the case would have stood if any person *sui juris* had been the petitioner, it is unnecessary to consider. The petitioner having been the wife of the lunatic, I think, on the assumption upon which we are now hearing the case, that the proceedings were reasonable, and for the benefit of the lunatic, that the solicitor employed by the wife for the purpose is entitled to stand directly in his own right as a creditor against the estate of the lunatic for the costs. Whether the amount of his demand ought to be diminished is a subject for future consideration, and when brought under the attention of the Court on any subsequent occasion will be dealt with. At present the case, I think, stands in such a position as that the solicitor, the alleged creditor, is entitled to call on the executors to go into the merits.

THE LORD JUSTICE TURNER. — I entirely concur in what has been said. Assuming the proceedings upon the commission to have been proper, and for the benefit of the lunatic, I think the solicitor employed therein has a right to sue in order to recover his costs of prosecuting those proceedings. I take it that the em-

(a) 5 Beav. 325.

(c) Amb. 102.

(b) 1 Y. & C. C. C. 171.

(d) 2 Ves. Sen. 407.

ployment of a solicitor by the person issuing the commission, and the acceptance by the former of such employment, is on the
 * 802 faith of his * proper costs being paid out of the lunatic's estate. The solicitor accepting the employment accepts it subject to that condition, and looks to the estate for payment of his costs. Lord HARDWICKE, in *Barnesley v. Powell*, (a) held that the right which the committee has enures for the benefit of the solicitor. And the same learned Judge, in the subsequent case of *Ex parte Price*, (b) allowed a solicitor a lien for his costs upon a fund in Court belonging to the lunatic, that solicitor having been employed to take out the commission by a person who had become bankrupt. The decision also in *Wentworth v. Tubb* (c) supports the plaintiff's claim. I think, therefore, there can be no doubt that the solicitor has this right.

THE LORD JUSTICE KNIGHT BRUCE. — We think that the Master of the Rolls has jurisdiction to enter into the question of debt in the suit.

1853. November 22, 23. December 22. Before the LORDS JUSTICES.

A testator entitled to realty and personalty, including a leasehold colliery, gave his general residuary estate to trustees, in trust to sell at a convenient time, with the approbation of his son, and out of the income to pay the testator's daughter for her life such an annuity as should be 200*l.* a year over half the income of the residuary estate, but not to exceed 600*l.* a year; and so that any annual overplus, after paying 600*l.* a year to the daughter and 400*l.* a year to the son, should go to the son, whom the testator constituted his residuary legatee, and appointed co-executor with the trustees. The trustees disclaimed. The son acted in the trusts, and did not sell the colliery, but carried it on till the mines were exhausted, paying out of his own moneys so much of the testator's debts as the testator's personal property, other than the colliery, was insufficient to satisfy, and paying the daughter 600*l.* per annum, out of the profits of the colliery, so long as they lasted: *Held*, —

1. That although the sale of the property was to take place with the son's appro-

(a) Amb. 102. (b) 2 Ves. Sen. 407. (c) 1 Y. & C. C. C. 171.

¹ S. C., 6 H. L. Cas. 217; 3 Jur. N. S. 699; 26 L. J. Ch. 825.

bation, he was not, after assuming to act as sole trustee, entitled to postpone the sale to his sister's prejudice.

2. That the son was chargeable with the value of the colliery at the end of a year from the testator's death, and with interest at 4l. per cent, and that the value ought, under the circumstances, to be calculated at the aggregate amount of the actual annual profits treated as deferred payments.¹

THIS was an appeal from a decree on further directions, made by Vice-Chancellor KINDERSLEY. The case is reported below in the first volume of Mr. Drewry's Reports, p. 576, where the will on which the question depended, and the facts of the case, are fully set out. The following is a short abstract of them : —

Thomas Devey Wightwick (the testator in the cause) was entitled to considerable real and personal estate, including a leasehold colliery and some canal shares. By his will he devised an estate called Little Bloxwich to his son Stubbs Wightwick (the defendant), and he gave all his other real and personal estate to John Fryer and William Tarratt, their heirs, executors, and assigns, upon trusts thus expressed : " Upon the special trust and confidence that they the said John Fryer and William Tarratt, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall at some convenient and proper period, with the approbation of my said son Stubbs Wightwick, absolutely sell and dispose * of all and singular my said real and per- * 804 sonal estates and effects, and, after converting the same into money, stand possessed thereof for the purposes in this my will, or in any codicil hereafter to be by me executed, named or to be named ; that is to say, by the ways and means aforesaid, or by mortgage thereof, or out of the rents and proceeds if more convenient, raise the sum of 1000l., and place the same out at interest, or invest it in the funds, for the benefit of my granddaughter Cecilia Lord as hereinafter mentioned and subject to the said sum of 1000l. to the use of my said granddaughter, upon trust that my said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, do stand seised and possessed of my said real and personal estate for the purpose of raising and paying, in the next place, one annuity or yearly sum of 30l. per annum unto my housekeeper Ann Beech. And subject as aforesaid for the purpose of raising and paying to my daughter Lucy Lord such an

¹ Wightwick v. Lord, 6 H. L. Cas. 217 ; Lewin Trusts (5th Eng. ed.), 246, 248.

annuity or yearly sum, for and during the term of her natural life, as shall be 200*l.* a year over and besides one-half share of the yearly income and produce of my real and personal estates (exclusive of the settled estate so hereinbefore limited to my son); my intention being that my said daughter shall have and enjoy an equal yearly income with my son during the term of her natural life, choosing to reckon (perhaps a little overdone) the estate I have hereinbefore limited to him in fee, and which was his late mother's jointure, at 200*l.* a year." "Provided, nevertheless, that it is my wish and intention that my said daughter's annuity shall in no case exceed the sum of 600*l.* per annum, and that any overplus in produce of my real and personal estates so given and devised to my said trustees, after payment of 600*l.* a year to my daughter and 400*l.* a year to my son, shall go and be paid to my

said son. And I wish it to be understood by my said trustees that what I call interest and produce * of my personal estate is not the income derived from the mines, but the profit arising after laying by and deducting thereout at least 10 per cent per annum to reimburse and pay back the capital expended in the plants and necessary wear and tear. And my mind and will further is, that the interest of the 1000*l.*, so hereinbefore given to my said trustees for the benefit of my granddaughter, shall be applied by them in the maintenance of my said granddaughter until her age of twenty-one years or day of marriage, which shall first happen, when the said sum of 1000*l.* shall be paid to her for her absolute benefit and disposal, and subject to the raising the said sum of 1000*l.* for the benefit of my said granddaughter, to the said annuity of 80*l.* per annum to my said housekeeper, and the said annuity so not to exceed 600*l.* per annum to my said daughter. I do hereby give, devise, bequeath, direct, limit, and appoint all my real and personal estate and effects whatsoever and wheresoever unto my said son Stubbs Wightwick, his heirs, executors, administrators, and assigns, to hold to him my said son Stubbs Wightwick, his heirs, executors, administrators, and assigns for ever, and to and for no other use, trust, intent, or purpose whatsoever. And I beg leave to state to my said trustees that, although I have apparently placed a great burden on their shoulders, yet it must be obvious to them that my son, on satisfactorily securing out of any specific parts of my property my granddaughter's, daughter's, and housekeeper's respective moneys and

annuities, he may be let into the actual possession and management of the whole of my property, without throwing any particular trouble on my said trustees. And I do hereby appoint my said son Stubbs Wightwick, and the said John Fryer and William Tarratt, executors of this my last will."

The two trustees disclaimed and renounced.

* The son alone proved the will. He sold and converted * 806 into money the personal estate, except the colliery and the canal shares. He carried on the colliery until it was worked out, and the profits after deducting 10% per cent, according to the directions in the will, amounted to 27,000%. The personal estate, exclusive of the colliery and the canal shares, was insufficient for payment of the testator's debts. The son paid the deficiency out of his own moneys, keeping on foot the debts which he had so paid as against the estate, and the question was as to the extent of his rights against the estate in respect of those payments, and of his liability in respect of his receipts on account of the colliery and canal shares.

The plaintiff's annuity of 600% per annum had been paid so long as the colliery was carried on, but had since fallen into arrear.

The Vice-Chancellor decided: First, that the personal estate was primarily applicable to pay the debts in exoneration of the real estate. Secondly, that with regard to the payment of debts, the son had a right to have applied, in payment of those debts, permanent personal property in exoneration of the wasting personal property which consisted of the leasehold mines. Thirdly, that the 10% per cent deduction, to be set apart to restore capital, with its accumulations, constituted personal estate, which the son had a right to have applied to pay the debts in exoneration of the wasting property. Fourthly, that in respect of any balances which should, upon the taking the further account, appear to be due to the son in respect of over-payments for debts beyond the assets applicable to the payment, he will be entitled to interest upon all those balances.

From this decree both parties appealed, the defendant * against the whole, and the plaintiff on the third and * 807 fourth of the above points.

Mr. Rolt, Mr. Campbell, and Mr. Chapman Barber, for the
[631]

plaintiff. — The plaintiff was entitled to have the deficiency of the income in any one year, to answer the annuity of 600*l.* a year made good out of the surplus of former years. In the accounts the colliery must be taken at the amount which it has produced, for the defendant, by improperly omitting to sell it, has prevented its value from being ascertained. The defendant cannot have interest on the debts paid by him, when none is allowed on the plaintiff's annuity.

They referred to *The Drapers' Company v. Davis*, (a) *Tew v. Earl of Winterton*, (b) *Anderson v. Dwyer*, (c) *Willcocks v. Butcher*, (d) *Aylmer v. Aylmer*. (e)

The Solicitor-General, Mr. Malins, and *Mr. Welford*, for the defendant. — If the colliery had been sold, it would have been impossible to pay the plaintiff the annuity of 600*l.* The proper mode of taking the accounts is to charge the defendant with the value at the testator's death with interest.

Mr. Campbell, in reply.

December 22.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the disclaimer and renunciation of Mr. Fryer and Mr. Tarratt, the trustees
 * 808 and two of the * executors appointed by Mr. Wightwick's will, which was proved by his son alone, appears to me not an immaterial circumstance. The present Mr. Wightwick chose to act solely as the testator's executor, and to act also as the sole trustee of the will, with respect to the realty, equally, and the personalty; and so undertook the task of performing duties to the proper fulfilment of which his interest was or might be opposed, precluding himself from the possibility of making profit of the trust, and from the possibility of withholding (if in any circumstances he could have withheld) "the approbation" mentioned in the will capriciously, arbitrarily, or with a view to the interest more of himself than of his sister. How the matter would have stood if Mr. Fryer and Mr. Tarratt, or either of them, had accepted

(a) 2 Atk. 211.

(d) 16 Sim. 366.

(b) 1 Ves. Jr. 451.

(e) 1 Moll. 87.

(c) 1 Sch. & Lef. 301.

and acted in the executorship and trusteeship, I give no opinion ; but upon the undisputed facts before us, taken together, including of course the amount and state of the debts and assets, it was, I conceive, as between Mr. Stubbs Wightwick and his sister, the duty of the former with all convenient speed (that is to say, with diligence after the testator's death) to sell and convert into money the whole of his convertible personal property. The colliery, however, was not sold, and there may have been prudence in not selling it. Nevertheless, as I apprehend, it follows that the capital of the testator's personal estate must substantially in some shape have the benefit of the whole of the clear income and proceeds of the colliery, until the time when in 1840 it was worked out. If this is so, every difficulty in the case probably is removed. The defendant must, I conceive, be allowed his reasonable expenditure on the colliery, to the same extent as if it had been in every sense proper for him to continue it and carry it on for his sister's benefit and his own. Observations similar in principle must be applicable, I think, to the canal shares, which are still a subsisting property.

* These views, in which my learned brother agrees, have * 809 rendered it incumbent on us to redraw the order, on further directions, which, after more than one ineffectual sketch by each of us, we have, as we hope, succeeded in doing.

His Lordship will state the minutes, the result of considerable deliberation by us. They do not include any provision for interest on arrears (if any), an omission intentional on our part. But they do contain, advisedly, a direction in favour of the plaintiff, as to her costs of the suit, from its commencement to this time, except those of her appeal, — as to which there will be no costs on either side. She will take back her deposit, and receive on account her brother's deposit.

My reasons for concurring in disposing of the costs as we now dispose of them consist (in addition to what I have stated) of the circumstance that, under the will (subject only to the plaintiff's title to a portion of the income of the testator's property during her life, and to the small life annuity of Mrs. Beech), the whole of the property belongs absolutely to the defendant, Mr. Wightwick, beneficially as well as legally ; the legacy of the plaintiff's daughter having been paid, and the further circumstance that this defendant, who, as a trustee for the plaintiff, owed duties to her not

performed, has been throughout, if not wholly wrong, at least much more in the wrong than she has been.

The provisional order allowing her 400*l.* a year will be continued.

The Lord Justice TURNER (after reading the material parts of the will) said: If the property had been sufficient for the
 * 810 purpose, the proper course would have been to * set apart 6666*l.* 13*s.* 4*d.* consols for the daughter's annuity. And if the son had desired to be let into possession, double that amount must have been set apart for answering the daughter's annuity of 400*l.* a year.

The son would then have had a right to insist on the mine being carried on, and the property would have been held by the trustees in trust to raise 1000*l.*, then to pay Mrs. Beech's annuity, then to pay the daughter 200*l.* a year, and divide the surplus income between the son and the daughter equally, if under 800*l.*, but if it should exceed that sum, then upon trust to pay 400*l.* to the daughter and the rest to the son. The trustees did not act in the trust, and the son assumed the trust. He must, consequently, be in the same position as that in which the trustees would have been.

So matters would have stood if the property had been sufficient for payment of the debts. This, however, was not the case. There were debts, and the personal estate could not reach the trustees until the debts were paid. The son as executor was bound to pay the debts before handing over the personal estate to the trustees.

The whole personal estate in the hands of the son, therefore, ought to have been converted, and the debts paid out of the proceeds.

The son, however, did not make the conversion, but assumed to deal with the property as trustee before the trust arose. Large profits arose, and were dealt with as if arising under the trust. They could not, however, properly be so dealt with, since the capital from which they arose never belonged to the trust. That capital, and all the profits which arose from it, ought to go
 * 811 back to * the fund from which it was diverted, namely, the general personal estate.

There is no specific bequest of any part of the personal estate to alter this, nor is there any specific bequest to the trustees, though

there might have been a right to enjoy *in specie* under the trust when and so far as the trust arose.

The case was spoken to on a subsequent day upon the minutes, which, after considerable discussion, were ultimately settled as follows : —

Declare that the personal estate of Thomas Devey Wightwick, the testator in the pleadings named, was the primary fund for the payment of his funeral and testamentary expenses and debts, and declare that it was the duty of the defendant Stubbs Wightwick, as the executor of the said testator, to apply the said personal estate in the payment of the said expenses and debts, before applying the same or any part thereof upon the trusts declared by the said testator's will.

Declare that the defendant, having assumed to himself the execution of the trusts of the said will, was not entitled to derive to himself any benefit from the execution thereof.

Declare that, having regard to the condition and amount of the said testator's personal estate, and to the amount of his debts as appearing by the said Master's report dated the first day of June, 1850, the whole of the said personal estate, including the colliery and canal shares in the said report mentioned, ought to have been * sold and converted into money, in order to the * 812 payment of the said expenses and debts.

Inquire what, at the end of one year next after the death of the said testator, was the amount of the said testator's personal estate which had then been realized, and the value of such parts thereof, including the said colliery and canal shares, as had not then been realized.

Declare that, in making the aforesaid inquiry, the said colliery ought to be valued at a sum equal to the aggregate amount of the net profits which were made therefrom in the year next after the death of the said testator, and of a sum equal to the value of the several and respective amounts of the net profits which were made therefrom in each year, from the termination of the said first year up to and including the year 1840, reckoning such several and respective amounts as deferred payments accruing due respectively, at the termination of the several years in which the same were

respectively realized ; and let the value of such deferred payments be ascertained accordingly.

Declare that, in making the aforesaid inquiry, the canal shares ought to be valued at a sum equal to the present value thereof, together with a sum equal to the aggregate amount of the net income made therefrom in the year next after the death of the said testator, and of a sum equal to the value of the several and respective amounts of the net income which has been made therefrom in each year, from the termination of the said first year, reckoning such several and respective amounts of net income as deferred payments accruing due respectively at the termination of the several years in which the same were respectively realized, after allowing

to the said defendant the advances made by him in respect
* 818 of * the allocation moneys in the said report mentioned, and interest thereon at the rate of 4l. per cent per annum, from the time when such allocation moneys were respectively paid; and let the value of the said canal shares be ascertained accordingly.

Declare that the personal estate of the said testator, which ought to have been held upon the trusts declared by the said will, consists of what, upon the making of the said inquiry, shall be found to be the amount and value of the said testator's personal estate and effects realized and unrealized, as aforesaid, after deducting therefrom the amount of the said testator's funeral and testamentary expenses and debts, and of any interest which accrued upon any of the said debts, in the year next after the death of the said testator.

Inquire what was the amount of the said testator's personal estate which ought to have been held upon the trusts declared by the said will, having regard to the aforesaid declarations.

Declare that the said defendant ought to be charged with interest at the rate of 4l. per cent per annum, upon such amount from the end of one year next after the death of the said testator.

Declare that the capital of the property which ought to have been held upon the trusts declared by the said will, consists of all the said testator's real estates, other than those by the said will appointed to the said defendant under the power of appointment therein referred to, and of what upon the inquiry aforesaid shall be found to be the amount of the said testator's personal estate

which ought to have been held upon such trusts, and that the income of the said testator's real and personal estate, * which ought *de anno in annum* to have been held and * 814 applied upon the said trusts, consists in the first year next after the death of the said testator, of the rents and profits of the said real estates, and after the expiration of the same first year of the said rents and profits, and of the interest with which the said defendant is chargeable as aforesaid.

Declare that such annual income ought in the first place to have been applied in payment of interest at 4*l.* per cent per annum upon the legacy of 1000*l.* given to Cecilia Lord, the said testator's granddaughter, until she attained the age of twenty-one years, and that upon her attaining that age the said legacy of 1000*l.* was payable and ought to have been paid out of the capital of the said real and personal estate which ought to have been held upon the trusts aforesaid, *pro rata*, according to the respective value and amount of such real and personal estate.

Declare that, subject as aforesaid, the said annual income ought to have been applied in payment to the said Ann Beech of the annuity of 30*l.* given to her, and then in payment to the said plaintiff of the annuity of 200*l.* given to her, and that the said plaintiff was and is further entitled to one moiety or equal half-part of the surplus of the said annual income after such payments thereout as aforesaid, to an amount not exceeding 400*l.*, over and above the said annuity of 200*l.*

Declare that any deficiency of the rents and profits of the said real estates in the first year next after the death of the said testator, for payment of the said annuity of 200*l.*, was chargeable in favour of the said plaintiff, upon the capital of the said real and personal estate which ought to have been held upon the trusts aforesaid according * to the then respective value and * 815 amount of such real and personal estate.

Inquire whether any and what part of the Great Bloxwich estate in the pleadings of this cause mentioned has been sold, and when and by whom and for what amount, and what was the net amount of the proceeds of such sale (if any), after deducting the expenses attending the same, and when and by whom such net proceeds were received, and how the same were applied.

Inquire what, having regard to the declarations aforesaid, was the amount of the income which in each year since the death of

the said testator ought to have been held and applied upon the trusts of the said will ; and what, having regard as aforesaid, was the amount which in each year since the death of the said testator ought to have been paid to the said plaintiff in respect of her said annuity of 200*l.*, and her moiety of the surplus income ; and what (if any thing) is now due to the said plaintiff in respect of her said annuity and moiety of income, having regard to the payments which have been made to her and to what she is chargeable with for housekeeping.

Reserve the consideration of the question whether the plaintiff is entitled to any and what increase of her annuity in case it shall appear that any part of the said Great Bloxwich estate has been sold.

Declare that the defendant Stubbs Wightwick is not entitled to any costs of this suit up to the present time, except his costs of the two petitions of appeal ; and that the plaintiff's costs of this suit up to the present time, including her costs of the said two petitions of appeal, and the defendant's costs of the said two petitions of appeal ought to be paid out of the capital of the real and personal estate, which ought to have been held upon the trusts aforesaid.

1855. January 31. Before the Lord Chancellor Lord CRANWORTH.

Special order made by the Lord Chancellor, that, instead of the sum payable under the 6th Order of 25th October, 1852, as a further fee for the certificate upon the passing of a receiver's and manager's account, there should be paid such a fee as the Judge to whose Court the cause was attached should think reasonable.

In another case the Lord Chancellor directed the fee, under the same order, to be paid on each 100*l.* of the net profits of the business over which the receiver and manager had been appointed.

By the schedule to the 6th of the Orders of the 25th October, 1852, it is ordered, that the fees to be collected by means of stamps in the Judge's chambers shall be, — “ For every certificate or report, 1*l.* ; and for every certificate upon the passing of a re-

ceiver's and consignee's account a further fee, in respect of each 100*l.* received, of ten shillings."

The above-mentioned orders purport to be made in pursuance of the Act 15 & 16 Vict. c. 80 ; by the 38th section of which Act it is provided " that no greater amount of fees shall be payable by the suitors of the said Court to the officers thereof, in respect of the business to be conducted before the Master of the Rolls and the Vice-Chancellors respectively sitting at chambers, and their respective chief clerks, than is now levied in respect of similar or analogous business in the Master's offices."

By an order made in the above cause, the defendant, who was one of the executors and trustees of the will of the testator, was appointed receiver of the rents and profits of the real and also of the outstanding personal estate of the testator, and manager of the testator's business, without giving security and without salary ; and he was directed to carry on the business with the personal estate of the testator, and to pass his accounts yearly before the Judge.

The receiver brought in his first yearly account to be passed, from which it appeared that the gross amount of receipts during the year amounted to 16,000*l.* and upwards, * and * 817. upon this sum the Vice-Chancellor's STUART's chief clerk required payment of 10*s.* in respect of each 100*l.* received pursuant to the above order.

On the part of the receiver it was contended that the *ad valorem* duty of 10*s.* per cent was payable not in respect of the gross receipts, but only in respect of the actual profit derived from the business during the year (that is to say), on 1183*l.* 2*s.* 2*d.* ; that a distinction must be drawn between the defendant's receipts as manager and his receipts as receiver ; that in managing the business he was performing the same duties as would have been performed by the trustees of the will, if they had continued to carry on the trade ; that they would have passed their accounts and paid the profits only to the receiver, upon which alone the *ad valorem* duty would have been payable under the above order ; that the union of the two characters of manager and receiver in the same person did not affect the result and make a larger amount of duty payable than would have been payable if one person had been manager and another receiver.

The chief clerk, however, declined to alter his view of the matter,

and the point being referred to the Vice-Chancellor, he confirmed the chief clerk's decision.

Mr. Speed now renewed the application before the Lord Chancellor, and asked for an order authorizing the officer of the Court to receive the *ad valorem* duty on the amount of the actual profits only.

THE LORD CHANCELLOR. — Under the circumstances of the present case, I shall make a special order that instead of the sum payable as a further fee for the certificate on the passing of this receiver's accounts, there shall be paid such a fee as the

* 818 * Judge to whose Court this cause is attached shall think reasonable.

(NOTE.)

WASTELL v. LESLIE.

On the 12th January, 1853, a similar application was made to the Lord Chancellor by *Mr. Speed*, in the case of *Wastell v. Leslie*, where a manager and receiver had been appointed for the purpose of carrying on the business of a lunatic asylum. In that case it appeared that the average annual income of the asylum was about 14,000*l.* per annum, and the annual expenditure about 12,000*l.*, leaving a yearly profit of 2000*l.* On the 16th February, 1853, his Lordship having in the mean time considered as to the propriety of making a new order to modify the existing order, or of making a special order to meet the exigency of the case, directed the fee of 10*s.* to be paid on each 100*l.* of the net profits.

VIVIAN v. COCHRANE.

1854. December 11. 1855. January 31. February 2. Before the Lord Chancellor Lord CRANWORTH, assisted by Mr. Justice WIGHTMAN and Mr. Baron MARTIN.

By the decree made under the London Tithe Act (37 Hen. 8, c. 12), it is provided that the inhabitants of London shall pay 2*s.* 9*d.* in the pound for tithe upon the rent reserved; or if a less rent is reserved by reason of any fine, or if the owners are also occupiers, then the tithe is to be paid at the same rate upon the rent at which the premises were last letten for without fraud or covin: *Held*, that the decree assumes that every house has a rent attached to it or representing it, and except in case of invariable rents which have remained, or are assumed to have remained, unchanged since the pass-

ing of the Act, the word rent, as there used, means rack-rent, and where the house is not let, it means the full value to let.

The defendant was the lessee of premises in London, which were let for a term of sixty years at a reserved rent (including insurance) of 102*l.* 10*s.*, in consideration of the lessee laying out 2000*l.* in building thereon; the improved annual value of the property after the building was completed was 250*l.*: *Held*, that under the statute, the defendant must be considered as owner of the house during the term, and that the tithe must be paid at 2*s.* 9*d.* in the pound on the full annual value of 250*l.*

The second resolution in *Skidmore v. Bell*, 2d Inst. 660, to the effect that such houses as were never letten to farm, but inhabited by the owner, is *casus omissus*, and shall pay no tithes by force of the decree, is not now law.

THIS was an appeal by the defendant from the decree of the Vice-Chancellor WIGRAM, made on the 24th December, 1844. The case is reported in the fourth volume of Mr. Hare's Reports, page 167.

The question in the cause arose upon the construction of the decree made under the London Tithe Act (37 Hen. 8, c. 12), which provides for the payment of 2*s.* 9*d.* *in the pound * 819 for tithes upon the rent reserved; or if a less rent is reserved by reason of a fine or of the owners being occupiers, then upon the rent at which the premises were last letten for, without fraud or covin. The Vice-Chancellor held, under the circumstances of this case, that the rent contemplated by the statute was to be calculated upon the annual value to let, and not upon the rent actually received.

The defendant originally appealed to the Lord Chancellor, Lord TRURO, before whom the appeal was heard in July, 1851. On the 11th November, 1851, his Lordship, without deciding the question, made the following observations in directing a case for the opinion of the Court of Common Pleas. After shortly stating the facts which are more fully given below, his Lordship proceeded: "The question in this cause is of a very general nature, and must be applicable to a great many cases, and it is one of pure law, depending wholly on the construction of the Act of Parliament; and such being the nature of the question, and its applicability to so many cases, I have resolved to send a case for the opinion of the Court of Common Pleas. I should be sorry to add to the expense of this litigation, but there are no facts in dispute, and the case turns upon the construction of four clauses of the Act; and I think I consult the interest of the parties in the cause as

well as the public interest by taking this course, as the expense of the case bears no proportion whatever to the expense which would be occasioned by an appeal to the House of Lords, which it is highly probable would follow upon my decision. I would only observe that the judgment of the Court below in this case is either misreported, or the learned Judge decided upon an impression that the facts of the case were materially different from what by

the statement of the case they appear in truth to have been,
* 820 and the judgment * seems to follow from reasoning which resulted from the incorrect view of the real facts. The judgment is founded upon the supposed fact that no house was in existence at the time the lease was granted, and that therefore the rent reserved could not be treated as a rent of the house which was built after the lease was granted; whereas the lease itself recites the fact that the house had been rebuilt before the lease was granted at an expense of 2000*l*. The mistake appears to have arisen from confounding an agreement which had been entered into before the houses were built with the lease which was granted after the houses were built. How far that mistaken view of the facts influenced the judgment I am not prepared to say, or perhaps the report itself may be incorrect. The opinion of the Court of Common Pleas may be taken at a comparatively trifling expense, and the present state of business ensures a speedy decision. Therefore let a case be sent to the Court of Common Pleas."

The parties not having agreed upon the form in which the case was to be submitted to the Court of Common Pleas, before the passing of the Act 15 & 16 Vict. c. 86 (by the 62d section of which a Court of Equity is empowered to determine the legal rights of parties without directing a trial at law), it was arranged that the appeal should be heard by consent of the Lord Chancellor before his Lordship; assisted by two of the Judges of the Courts of Common Law. His Lordship having accordingly invited the attendance of Mr. Justice WIGHTMAN and Mr. Baron MARTIN to assist in the determination of the question, those learned Judges now attended. The facts of the case, together with all the arguments and authorities cited, are so clearly and fully stated in the joint opinion which was delivered by Mr. Justice WIGHTMAN on behalf of Mr. Baron MARTIN and himself, that it would be superfluous to make any other report.

* *Mr. Daniel* and *Mr. Speed* appeared for the plaintiff, * 821 the rector, in support of the Vice-Chancellor's decree.

Mr. Malins and *Mr. A. J. Lewis*, for the defendant, the appellant.

Mr. Daniel, in reply.

At the conclusion of the argument the learned Judges desired time to consider the question which had been submitted to them, and on the 31st January, 1855, Mr. Justice WIGHTMAN, on behalf of Mr. Baron MARTIN and himself, delivered the following joint opinion:—

1855. January 31.

My Lord,—Your Lordship having requested my brother MARTIN and myself to hear the case argued and give our opinions upon it, I have now to state to your Lordship that we are agreed in the opinion which I now proceed to deliver to your Lordship.

The plaintiff in this case is the rector of the parish of St. Peter Le Poer, in the city of London, and the defendant represents the National Bank of Ireland, occupying the house No 13, Old Broad Street, within the parish. The question in the cause is, whether the plaintiff, as rector of the parish, is entitled to 2*s.* 9*d.* in the pound upon 250*l.*, the annual value of the premises to let, or upon 102*l.* 10*s.*, the rent paid for them to the governors of Christ's Hospital.

It appears that in 1802 the treasurer of Christ's Hospital agreed with one James Stewart to let to him the site of the house in question in Old Broad Street, upon which old houses had stood, for the term of sixty years * from 1803, at the rent of 84*l.* * 822 and 3*l.* a year for insurance, he agreeing to lay out 2000*l.* in building a new house on the same site. Stewart assigned his interest in the agreement to Lee, and he to Harman.

In 1807 the governors of Christ's Hospital, by an indenture (reciting the agreement), in consideration that Stewart, Lee, and Harman, or some of them, had expended more than 2000*l.* in rebuilding the premises, and in consideration of the rents and covenants, demised the house No. 13, Old Broad Street (the house in question), to Harman for fifty-seven years at the yearly rent of 92*l.* 10*s.*, which was made up by adding 8*l.* 10*s.* (the land-tax

which had been redeemed by the lessors) to the 84*l.*, the rent specified in the agreement, and the further annual sum of 10*l.* for insurance instead of 8*l.*, making together 102*l.* 10*s.*

In 1888, after some mesne assignments, the premises in question, being the house No. 18, Old Broad Street, were assigned to trustees on behalf of the National Bank in consideration of 1950*l.* paid by them to the assignor.

It does not appear that the premises in question, or any previously existing on the same site, were ever let at a higher rent than 102*l.* 10*s.*

The case was heard before us upon appeal to the Lord Chancellor from the decree of the Vice-Chancellor WIGRAM, who was of opinion that the plaintiff was entitled to 2*s.* 9*d.* in the pound upon the annual value of the premises, which was agreed to be 250*l.*, and not upon the rent paid by the occupants.

The claim of the plaintiff is founded upon the decree made
 • 823 in pursuance of the Statute 37 Hen. 8, c. 12, and * which by the statute is to have the force of an Act of Parliament.

The decree was made in the year 1545, and by it the inhabitants of the city are to pay their tithes to the parsons and vicars of the city after the rate of 2*s.* 9*d.* of every 20*s.* rent by the year of all houses, shops, warehouses, cellars, stables, and every of them, within the city, and so above the rent of 20*s.* by the year, ascending from 10*s.* to 20*s.* according to the rate aforesaid.

By the 8*d.* clause, if a lease is made of any dwelling-house, &c., by fraud or covin, reserving less rent than accustomed, or without any rent reserved by reason of a fine or income paid beforehand, or by any other fraud or covin, the tenant shall pay for tithes according to the quality of such rents as the same were last let for, without fraud or covin, before the making of such lease.

By the 4*th.* clause, every owner of a house, &c., occupying the same himself, shall pay for tithes after the quantity of such yearly rent as the same were last let for, without fraud.

By the 7*th.* clause, if houses, &c., are let over by the farmers of them, the lessees or occupiers are to pay tithes upon the rent they are charged with, without fraud.

By the 10*th.* clause, if a house, &c., with garden, &c., belonging to or occupied with it be severed, the occupier of the garden, &c., so severed shall pay after the rate of the rent thereupon reserved.

The 14*th.* clause provides that for such gardens as do not belong to

a mansion-house, and which any person holds for pleasure and for his own use, no tithes shall be * payable; but if * 824 any person holding such garden, containing half an acre or more, make any yearly profit thereof by way of sale, he shall pay tithes for the same after such rate of his rent as in the decree is first specified.

By the 20th clause, it is provided that if any person takes a tenement for less rent than it was accustomed to be let for, by reason of great ruin or decay, burning or such like occasion or misfortune, that then such person shall pay tithes only upon the rent reserved as long as the lease shall endure. These are the clauses of the decree which most materially bear upon the present question, and which were chiefly referred to upon the argument.

Throughout the whole decree the reference for the computation of the tithes is always in terms to the rent, and in no part of it is there in terms any reference to or mention of the annual value. If the decree is to be construed according to the literal meaning of the words used, many persons might escape the payment of tithes in respect of houses which it would hardly be the intention of the framers of the decree to exempt from such payment. A house which had never within memory been let at a rent, but had always been in the occupation of the owner, or, if let, had always been let at a pepper-corn rent, with a fine, or had been newly constructed on a site which had previously been a pleasure garden, and was either occupied by the owner, or let at a pepper-corn, with a fine, would not, according to the terms of the decree, taken literally, be liable to pay tithes, as there would be no rent in respect of which the amount could be ascertained.

It was admitted, on the part of the defendant, that the * terms of the decree were not to be so strictly construed, * 825 and that in cases where there was no rent by which the tithe could be ascertained, it was to be paid according to the annual value, but that wherever there was a rent, however disproportionate to the annual value, the tithe was, according to the true construction of the decree, to be ascertained by the rent, and not by the value.

If the annual value may be taken as a criterion for the amount of tithe, where no rent is payable or has been paid, upon a liberal construction of the terms of the decree, it would seem reasonable to extend such construction to cases where rents, either ancient or

modern, are little better than nominal, and afford no indication of the real annual value, and it was contended for the plaintiff that the rent was the criterion only, where it was, when first created, in the nature of a rack-rent, and not where it could only be considered, as in the present case, in the nature of a ground rent, or rent in respect of the site merely, and not in respect of the house itself.

There is, no doubt, some difficulty in reconciling this view of the subject with the terms of the decree, and, upon reference to the cases in which the proper construction to be put upon the decree was in question, and which were cited upon the argument, it will not be found easy to reconcile them all with each other, or, in respect to the earlier cases, to draw any certain conclusion from them.

In two of the earliest reported cases, *Skidmore v. Bell* (a) and *Dunn v. Burrell*, (b) where leases of houses in the city had been granted, rendering the ancient and accustomed rent, and * 826 also paying, at the * same time with the rent, certain portions of a sum payable by way of fine, which portions were so spread over the term as to make the payment of the fine coextensive with the term, it was considered by Lord Chancellor ELLESMERE in the first case, and by Lord Keeper BACON, assisted by the Chief Justices MONTAGUE and HOBART and the Justices DODDRIDGE and HATTON in the second, that tithe should be payable in respect of the ancient rent only, and that the portions of the fine, though payable at the same time with the rent, were not rent; and in the former of those cases, *Skidmore v. Bell*, (c) it was considered that houses that were occupied by the owners, and never let at a rent, were not to pay tithe at all, and that such a case was *casus omisus* in the decree.

In the case of *Ivatt v. Warren*, (d) which was decided a year after the case of *Dunn v. Burrell*, (b) it appeared that one Amabel Coxe had built the house in respect of which the tithes were claimed, partly on the site of a shed and partly on some waste ground belonging to a house of her late husband, about three or four years before the suit, and that Amabel had granted a lease of the new house to Warren for twenty-one years, at 9*l.* per year rent, and that 20*l.* was paid to her by Warren by way of fine. It

(a) 2 Inst. 659.

(c) 2 Inst. 620.

(b) 1 E. & Y. 270.

(d) 3 Gwil. 1054.

was contended for Warren that he should pay no tithe at all, but it was held in the Court of Exchequer that the meaning of the decree was that tithes were payable for houses in the city after the rate of 2s. 9d. in the pound, according to the true value as the same were worth to be let by the year, and that if the house in question had been a shed, it ought to be discharged of tithe no longer than it continued a shed, but, being converted into a dwelling-house, it ought to pay tithe according to the true value.

It was thereupon *ordered that 24s. 9d. should be paid * 827 annually for tithe, which amounts to 2s. 9d. in the pound upon 9l., the annual rent, which the Court appears to have considered the annual value, taking no notice whatever in the judgment of the 20l. fine, which would raise a presumption that the annual value was greater than the rent.

The next case is that of *Burgess v. Symons*, (a) in the reign of King Charles the First. The case turned principally upon a question of jurisdiction, and is only important for the opinion expressed by the Chief Baron WALTER. He is reported to have said that "he could show the case adjudged where one leased a house in London rendering rent, and afterwards purchased the same house in fee, and, although no rent was then paid, the parson should have his tithe according to the last rent paid; but if any one builds a new house and inhabits it, or leases it rent free, the parson shall not have tithe or remedy."

In the case of *Sheffield v. Pierce*, (b) which was decided in the reign of King Charles the Second, it was held in the Court of Exchequer that tithes of houses in London were to be paid according to the improved rent, and not according to the old rent payable at the time of the decree.

The cases to which we have referred are no doubt authorities, as far as they go, in favour of the proposition contended for by the defendant, that the tithe is to be estimated by the existing or last rent payable, notwithstanding that from the circumstances of a fine being paid it may be inferred that the premises are of greater annual * value than the rent; and they go further * 828 than the defendant proposes, as in two of them, *Skidmore v. Bell* (c) and *Burgess v. Symons*, (a) it was said that tithe was not payable by the decree in respect of a house which had never

(a) Lit. Rep. 141.

(b) 2 Gwil. 503.

(c) 2 Inst. 659.

been let at a rent; and though in the case of *Ivatt v. Warren*, (a) according to the report, the Court said that tithe was payable according to the annual value of a shed, converted into a house, which was let at a rent, the decree was for payment according to the rent only, which, as there was a fine paid, would appear to have been less than the annual value.

Such appears to have been the state of the authorities down to the reign of William and Mary upon the question now under consideration.

In *Ward v. Hilder*, in the Exchequer in 1698, (b) the plaintiffs, the impropiators of St. Lawrence, Poultny, in the city, brought a suit for tithes against the defendant, the occupier of a house and yard, and wharf belonging to it in the parish, alleging that for all time of memory 1*l.* 16*s.* a year had been paid for tithe of the premises, that the houses and buildings which formerly stood on the site of the defendant's premises having been burned down in the great fire, and the then present buildings having been erected on new foundations, the defendant refused to pay any tithe at all, not even the 1*l.* 16*s.*, though the new house, &c., was worth 60*l.* a year. The defendant admitted that his house was worth 40*l.* a year, but denied his liability to pay tithes, and contended that the 8*7* Hen. 8, c. 12, and decree, did not extend to lay impropiators.

The Court was of opinion that they did; and the defendant * 829 refusing to pay * the 1*l.* 16*s.* a year, which the plaintiffs were willing to accept for tithes, the Court ordered that he should pay 2*s.* 9*d.* in the pound upon 80*l.* per annum, as the rent or value which the plaintiffs were willing to accept, though the premises were proved to be of greater value.

In that case the Court appears to have treated the rent and the annual value as the same; and as the house was new, and built on a new foundation, the rent or value was fixed for the first time at 80*l.* by the year by the plaintiff's consent, though something below the real value.

In *Sayer v. Mumford*, (c) in the same reign, the Court ordered the defendants to pay 2*s.* 9*d.* in the pound for tithe upon the yearly rents, which seem to have been rack-rents, of the houses occupied by the defendants.

The case of *Williamson v. Gosling*, (d) in Chancery, occurred in

(a) 3 Gwil. 1054.

(c) 2 Gwil. 546.

(b) 2 Gwil. 538.

(d) 3 Gwil. 902.

the early part of the reign of George the Third; it is very shortly and very satisfactorily reported. It appears, however, from the summary of the case in the judgment of Lord Chief Baron MACDONALD in *Kynaston v. The East India Company*, (a) that Gosling built two new houses upon the site of four decayed houses, for the tithes of three of which customary payments had been made. The Court decreed payment according to three of the customary payments set up; but for so much of the premises as was built upon ground where an alehouse had stood, in respect of which no customary payment was shown, decreed payment of tithes after the rate of 2s. 9d. in the pound upon the yearly value admitted by the defendant's answer.

* In *Bramston v. Heron*, (b) in the Exchequer, decided * 880 in 1787, two of the defendants, Heron and Fleet, refused to pay any tithe, because each alleged that he occupied a house built on the site of old houses, shops, and warehouses, which had not paid tithe; and a third defendant, Underwood, refused to pay more than 10s. a year, he occupying a house newly built upon the site of five old houses, in respect of which it may be presumed, though not stated in the report, a payment of 10s. a year had been made. The Lord Chief Baron, however, decreed that defendants should pay tithes as charged by the plaintiff in his bill, which would appear to be according to the yearly rent admitted to have been paid by the defendants; the Lord Chief Baron observing, with respect to *Underwood's Case*, that twelve years would not be long enough to constitute an old or customary payment.

The case of *Kynaston v. The East India Company*, (c) decided in the Exchequer in 1806, carried to the House of Lords, who affirmed the judgment of the Court of Exchequer in 1813, is a very important authority upon the present question. The plaintiff claimed tithes of certain houses and warehouses in the occupation of the defendants, according to the then improved or well-known rent or annual value. The defendants alleged that the houses, &c., had been built by them the owners on the site of some buildings previously standing there, but that they did not know what rents had been paid in respect of the old buildings, and that the new buildings were in their own occupation as owners, and had never been let at a rent. The Lord Chief Baron MACDONALD

(a) 4 Price, 84, in notis.

(b) 4 Gwil. 1814.

(c) 3 Swanst. 248 and 4 Price, 84, in notis.

decreed that the annual value of the buildings should be
 * 831 ascertained, and * 2s. 9d. in the pound be paid upon that.

He founded his judgment mainly upon the cases of *Bramston v. Heron* (a) and *Williamson v. Gosling*, (b) observing, with respect to *Bramston v. Heron*, that in that case there was no occasion to resort to value, because there was a rent; but it showed that a newly built house ought to pay tithe, and it may be added that the rent, for all that appeared, was a rack-rent. The case of *Williamson v. Gosling*, he said, went the whole length; for the decree was that for the new house the defendant should pay tithe according to the yearly value.

That case was followed very shortly afterwards by that of *Antrobus v. The East India Company* in Chancery. (c) The circumstances were much the same as in *Kynaston v. The East India Company*. (d) The company had built houses and warehouses upon the site of small tenements, some of which had been held at low rents. The defendants insisted that no tithe was payable in respect of houses recently built upon the site of other houses, the ancient rents of which were unknown. The Master of the Rolls (Sir WILLIAM GRANT), after observing upon the difficulty in such a case of reconciling the clause with the precise words of the decree, says that upon the whole less violence is done to the decree by construing the word "rent" in different senses, as it is used in different clauses, than by holding that all houses that were never leased at a rent are out of the decree, and that he understood the word "rent" might either be the reserved or the estimated rent, according to the circumstances of the case; and he decreed that tithe should be payable according to the annual value of the premises.

The case of *The Warden and Minor Canons of St. Paul's v. The Dean of St. Paul's* was decided in the
 * 832 Exchequer in May, 1817, by Lord Chief Baron RICHARDS. (e) In that case the dean claimed exemption from tithes for the deanery, on the ground, amongst others, that it had never paid any, or at most only a small customary payment, which was, however, not relied upon, and the Lord Chief Baron decreed payment to be according to the annual value.

That case was followed in the same year, and in the same Court,

(a) 4 Gwil. 1314.

(d) 3 Swans. 248.

(b) 3 Gwil. 902.

(e) 4 Price, 69.

(c) 13 Ves. 9.

by that of *The Warden and Minor Canons of St. Paul's v. Crickett*. (a) The defendant occupied a house under a lease from the Dean and Chapter of St. Paul's, granted in the consideration of a surrender of a former lease, whereby there was reserved the yearly rent of a capon, and of his paying the Dean and Chapter a yearly rent of 1*l.* 2*s.* 6*d.* and a fine of 30*l.* It did not appear that a larger rent than 1*l.* 2*s.* 6*d.* had ever been paid; but the fines payable upon renewals had been constantly incurred. The defendant had purchased the premises, and at the time of the claim which was for tithes upon the annual value, admitted to be from 30*l.* to 40*l.*, was the owner of the freehold in them. The Lord Chief Baron RICHARDS decided that tithes were payable only upon the rent of 1*l.* 2*s.* 6*d.*, and not upon the annual value, and that the fines could not be considered rent, and that, as the lease under which the rent was payable was an ecclesiastical lease, it might be that from the time of Henry the Eighth the rent had been the same or not greater, and that fines had constantly been taken, and the rent continued the same from that reason. He founded his judgment mainly upon a previous decision of Lord ROSSLYN in 1795, in the case of *The Warden * and Minor Canons of * 888 St. Paul's v. Crickett*, (b) between the same parties and with respect to the same premises, in which Lord ROSSLYN held that tithes were payable in respect of the rent of 1*l.* 2*s.* 6*d.* only, and not of the annual value, and without any regard to the fines.

In the case of *Letts v. The London Corn Exchange Company*, (c) the decree was for tithes according to the annual value, it not appearing that there had been any customary payment in lieu of tithe, or any renewal upon a demise.

The foregoing appear to be all the authorities that bear materially upon the present question, and the result of them appears to be that, notwithstanding dicta apparently to the contrary in one or two of the early cases, there are no houses in the city wholly exempt from payment of tithe, and that according to the true construction of the decree there are no omitted cases, and that the occupiers of houses are liable to the payment in respect of tithes, either of some ancient customary payment or composition, or of 2*s.* 9*d.* in the pound, according to the accustomed rent or according to the estimated rent or annual value.

(a) 5 Price, 14.

(b) 2 Ves. Jr. 563.

(c) 1 De G., M. & G. 398.

It appears from the cases of *Ivatt v. Warren*, (a) *Williamson v. Gosling*, (b) *The Warden and Minor Canons of St. Paul's v. The Dean*, (c) *Kynaeton v. East India Company*, (d) *Antrobus v. East India Company*, (e) *The Warden and Minor Canons of St. Paul's v. Crickett*, (g) and *Letts v. The London Corn Exchange Company*, (h) that the parson or other tithe-owner may make his claim *prima facie* for 2s. 9d. in the pound upon the estimated * yearly rent or value, according to the true construction of the first clause of the decree, and that it is for the defendant to show that he ought not to be charged in respect of the estimated rent, but in respect of some reserved rent less than the estimated rent or value.

The decree in all its clauses uses the word "rent," and never "value;" but it seems clearly to have been understood by the framer of it that the rent intended was either an existing rack or estimated rent, or a rent which had been a rack or estimated rent either when the decree was made, or at some time after.

If a certain amount of rent, though less than the annual value when brought into question, has been so long paid that its original relation to the annual value cannot be ascertained, it may fairly be presumed that the rent when first payable was the annual value, though it may also appear that intermediate assignments and underleases have been made at the same rent, but with fines taken proportionable to the difference between the real and annual value; and in such a case it would appear, from the cases of *Williamson v. Gosling*, (b) *The Warden and Minor Canons of St. Paul's v. Crickett*, (g) and others of the cases before referred to, that the tithe ought only to be payable according to the accustomed rent which had been paid, even though the occupier should become the owner, as in the case of *Crickett*.

The terms of the third clause of the decree show clearly that the "rent accustomed" must mean rent which, when created, expressed the annual value; and it has been settled by the cases before referred to that, if a new house be built, and there is no "accustomed rent" by which the * tithe can be estimated, that the tithe shall be estimated by the annual value.

(a) 3 Gwil. 1054.

(e) 13 Ves. 9.

(b) 3 Gwil. 902.

(g) 2 Ves. Jr. 563.

(c) 4 Price, 65.

(h) 1 De G., M. & G. 398.

(d) 3 Swanst. 248.

In the present case, the house occupied by the defendant was, as in the cases of *Dunn v. Burrell*, (a) *Ward v. Hilder*, (b) *Williamson v. Gosling*, (c) and several of the later cases before referred to, built upon the site of houses that were pulled down, and in respect of which it did not appear whether any or what rent had been previously payable.

The house in question was built by those from whom the defendant claimed by assignment under an agreement with the owners of the freehold, the governors of Christ's Hospital, who agreed to let the site of old houses to one of the parties through whom the defendant claimed for a long term at a rent of 84*l.* a year and 8*l.* for insurance in respect of the site of the house in question, the defendant undertaking to lay out a large sum in building houses on the site of the old ones. The house in question was built at an expense of more than 2000*l.* under this agreement, and, when built, the governors of Christ's Hospital, in pursuance of the agreement, granted a lease of the house at a rent of 102*l.* 10*s.* made up in the manner before specified, under which lease the defendant holds the premises, the annual value of them being 250*l.*

If the governors of Christ's Hospital had built the house themselves and occupied it, there can be no doubt but that, upon the authority of the cases last referred to, the occupiers would have been chargeable with tithe according to the estimated rent or annual value, and so if the defendant or his assignors had purchased the freehold in the site and built the house upon it.

* But was not the person who built the house, in this case, * 886 in the same situation for the purpose of the present question as he would have been in had he built it upon land of which he was the owner?

If he had taken a lease of the site at a rent, he would not be liable to pay tithe for it as long as it remained a site; but if he had thought fit to build a new house upon it, he would, according to all the modern decisions, have been liable to pay tithe for the house according to its annual value, the tithe being payable in respect of the house, and not in respect of the site.

The house in question was built under an agreement for a lease of the site at a rent, and appears to have been built before the lease was granted. If the parties had relied upon the agreement

(a) 1 E. & Y. 270.

(b) 2 Gwil. 538.

(c) 3 Gwil. 902.

merely, and the house had been occupied before the actual making of the lease, or if the lease had been, in the precise terms of the agreement, of the site only, it would have been difficult for the defendant to contend that the tithe was payable according to the rent of the site, and not according to the estimated rent for the house, as determined in principle by several of the best considered of the cases before referred to.

The lease, however, which was actually granted, is in terms of the house so built in pursuance of the agreement, and the rent is reserved in respect of the house, and not of the site merely. The reserved rent, however, at the time the lease was granted, was neither the accustomed rent nor the rack or estimated rent or annual value of the house, but was in fact the amount of rent that was by the agreement to be paid for the site merely, with the addition of land-tax and insurance.

* 837 The rent reserved by the lease may in this case be * considered in the nature of a ground-rent; and, in that view of the case, the defendant would be, for the term in the lease, owner of the house which was built upon a site, in respect of which a rent was payable, but which was not a rent for the house within the true meaning of the decree, and the construction upon it in the several cases to which reference has been made.

This was the view of the case taken by Vice-Chancellor WIGRAM, and in which we coincide, and are of opinion that the plaintiff is entitled to succeed upon his claims.

February 2.

THE LORD CHANCELLOR. — It is impossible to reconcile all the earlier cases. Lord COKE's dictum in *Skidmore v. Bell*, (a) to the effect that "such houses as were never letten to farm, but inhabited by the owner, is *casus omissus*," is not now law. The decree makes tithe payable on all houses at 2s. 9d. in the pound of the rent, and the only question is, what is meant by "rent," or, rather, on what sum is the 2s. 9d. to be calculated?

The substance of this case is that the lessee builds the house by which the landlord will eventually benefit, and in consideration of his doing so pays a less rent than he would have done if the landlord had built the house himself.

Can it make any difference, for the purpose of this charge, by

(a) 2 Inst. 659.

whom the house was built? The fourth section says that an owner occupying his own house shall * pay tithe after the * 888 quality of such yearly rent as the same was last letten for. On this it has been decided that a newly built house shall pay tithe on the yearly value: *Ivatt v. Warren*; (a) and this on sound grounds, for the statute certainly meant that all houses (except as therein excepted) should pay at some rate or other.

The last rent which it was letten for is stated only as a test of the value. All modern authorities have pointed to this result; and even if there were more difficulty in this construction than I think there is, still I should be guided by the long series of decisions so ably stated and commented on by Mr. Justice WIGHTMAN. The only question here is, whether the circumstance that here the rent actually paid is only 102*l.* 10*s.*, while the value is 250*l.*, makes a difference. I think not. The rent contemplated by the statute (excluding ancient and customary rents) is that which may be considered as the full rent between lessor and lessee; i.e., the full value to let, considering the house as the subject-matter of the lease on which rent is reserved.

Here the rent is not in truth reserved on the house, but on the ground on which the house is built. It does not represent, nor was it meant to represent as between lessor and lessee, the value of the house, but the value of the ground on which the lessee should build a house. The statute assumes that every house has a rent attached to it, or representing it; and, except in case of invariable rents which have remained, or are assumed to have remained, unchanged since the passing of the statute, the word rent, as there used, means rack-rent; and where the house is not let, it means the full value to let,—what a solvent tenant would pay for the privilege of occupying. Here * the * 889 house is not let at a rent within the meaning of the statute so as to make the rent reserved, the sum on which the tithe is to be assessed. If no rent were reserved, the tithe would be calculated on the value. The same principle must govern where the rent reserved does not purport to be, and is not meant as an equivalent for the use of the house; and that is the present case.

(a) 3 E. & Y. 1203.

In the Matter of The CHARITABLE TRUSTS ACT, 1853, (16 & 17 VICT. c. 137), and in the Matter of DAVENPORTS CHARITY.

1855. March 28. Before the Lord Chancellor Lord CRANWORTH.

The 28th section of the Charitable Trusts Act (16 & 17 Vict. c. 137) confers on the Master of the Rolls and the Vice-Chancellors at chambers the same jurisdiction as they would have exercised before the passing of that Act in a suit regularly instituted or upon petition.

New trustees of a charity having been appointed under the Act (16 & 17 Vict. c. 137), by the Vice-Chancellor, and the surviving trustee being lunatic, it is competent for the Vice-Chancellor in chambers to make the vesting order under the Trustee Acts, 1850 and 1852.

By the 28th section of the Charitable Trusts Act (16 & 17 Vict. c. 137), it is enacted that "where the appointment or removal of any trustee, or any other relief, order, or direction relating to any charity of which the gross annual income for the time being exceeds thirty pounds, shall be considered desirable, and such appointment, removal, or other relief, order, or direction, might now be made or given by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorized in this behalf by the order or certificate of the said board, or for the Attorney-General to make application (without any information, bill, or petition) to the Master of the Rolls, or one of

* 840 * the Vice-Chancellors, sitting at chambers, for such order, direction, or relief as the nature of the case may require; and the Master of the Rolls, or the Vice-Chancellor to whom any such application shall be made, shall and may proceed upon and dispose of such application in chambers, save where he may think fit otherwise to direct, and shall and may have and exercise thereupon all such jurisdiction, power, and authority, and make such orders and give such directions in relation to the matter of such application as might now be exercised, made, or given by the Court of Chancery, or by the Lord Chancellor intrusted as aforesaid, in a suit regularly instituted, or upon petition, as the case may require."

Under this section the Vice-Chancellor Wood had in chambers appointed new trustees of the funds of the above charity and settled a scheme. The surviving trustee of the funds of the charity being a lunatic, the Vice-Chancellor had some doubts as to whether he had the power to make the vesting order also under the Trustee Acts without a petition. At his suggestion the question was submitted to the Lords Justices, by whose desire it was now brought before the Lord Chancellor.

Mr. Pearson, on behalf of the new trustees of the charity, in support of the application, stated that the doubt as to the power of the Vice-Chancellor in this case arose upon the words "statutory jurisdiction," in the 28th section: first, whether those words included the jurisdiction given by statutes not relating expressly to charities; and, second, whether, as under the Charitable Trusts Act, all the jurisdiction originates by application in chambers, by summons, and not by petition in Court, the Vice-Chancellor could in chambers exercise the authority under the Trustee Acts of 1850 and 1851, so as to vest the property in the new trustees.

* THE LORD CHANCELLOR. — The meaning of the 28th * 841 section of the Charitable Trusts Act is to confer on the Master of the Rolls and the Vice-Chancellors sitting at chambers the same jurisdiction as before the passing of the Act they could have exercised in a suit regularly instituted, or upon petition. The fact of the lunacy can make no difference, and I am of opinion, therefore, that the Vice-Chancellor may in this case make the vesting order.

LASH v. MILLER.

1855. May 2. Before the Lord Chancellor Lord CRANWORTH.

Order made under the 52d. section of the Act (15 & 16 Vict. c. 86) for the prosecution of a suit against the assignees of a defendant become bankrupt after appearance, but before answer, with liberty for the assignees to answer, if they should be so advised.¹

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 159.

THE bill in this suit was filed on the 10th February, 1855, against two defendants, William Miller and Thomas Gray. A copy of the bill was served upon each of them, and they both appeared, and were required to answer. T. Gray had put in his answer, but W. Miller became bankrupt on the 3d April, and had not answered.

An application was made to the Vice-Chancellor WOOD for an order under the 52d section of the Act 15 & 16 Vict. c. 86, that the plaintiff might be at liberty to carry on and prosecute the suit against the assignees in bankruptcy of W. Miller in the same manner as the plaintiff might have prosecuted it against W. Miller, if he had not become bankrupt. The Vice-Chancellor refused the application, and on its being renewed before the Lords Justices their Lordships expressed some doubt as to whether the provision in question applied to a case like the present, and suggested that the matter might be brought before the Lord Chancellor.

Mr. Ellis accordingly now appeared in support of the application.—The order sought is equivalent to an order to revive.

* 842 * Under the old practice, where there was an abatement by death, all that was required to entitle the plaintiff to an order to revive was that there should be a certainty of title in the defendant against whom the order was sought. Thus Lord REDSDALE observes, “Wherever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains as an heir-at-law, executor, or administrator, so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely.” *Mitf.* p. 69. The 52d section of the 15 & 16 Vict. c. 86 applies to suits which have become defective as well as to suits abated; and under the 236th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106) it is provided, among other things, that “the appointment of assignees shall at all times and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted as evidence of such proceeding having taken place, without any further proof thereof;” and inasmuch as by the 141st and 142d sections of the same Act the whole of the bankrupt’s personal and real estate has vested in his assignees, no difficulty can now arise

with respect to the certainty of the transmission of interest, the title of the assignee in bankruptcy being equally clear as that of the heir or executor of a deceased party.

The Lord Chancellor made the order, with liberty to the assignees to answer if they should be so advised, observing that the application, if made after decree, would have been a matter of course under the 52d section. (a)

* The ATTORNEY-GENERAL *v.* ALFORD.¹

* 843

1855. January 22, 26. Before the Lord Chancellor Lord CRANWORTH.

An executor and trustee having for several years retained funds in his hands uninvested which he ought to have invested: *Held*, not to be chargeable with interest at five per cent, or upon the principle of annual rests, but with simple interest only at four per cent, there being no circumstances to lead to the conclusion that he had made any profit by his misconduct.²

The principle applicable to charging executors and trustees with interest in such cases considered.

The Court will only charge an executor or trustee with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive; and misconduct on the part of an executor or trustee will not, generally speaking, warrant such a presumption.³

(a) See the report of the Chancery commissioners, 1852, p. 20.

¹ S. C., 1 Jur. N. S. 361.

² See *Mayor of Berwick-upon-Tweed v. Murray*, 7 De G., M. & G. 497, and the explanatory observations of Lord CRANWORTH on this point at p. 519; *Lewin Trusts* (5th Eng. ed.), 276-280; *Hill Trustees* (3d Am. ed.), 547 *et seq.*, and notes and cases cited; and see *Townend v. Townend*, 1 Giff. 212; *Blogg v. Johnson*, L. R. 2 Ch. Ap. 225, 228; *Turner v. Burkinshaw*, L. R. 2 Ch. Ap. 488; *Frey v. Frey*, 2 C. E. Green (N. J.), 72, 74; *Barney v. Saunders*, 16 How. (U. S.) 542, 543; *Schieffelin v. Stewart*, 1 John. Ch. 620; *Burdick v. Garrick*, L. R. 5 Ch. Ap. 233.

³ See *Lewin Trusts* (5th Eng. ed.), 276, 277. In *Burdick v. Garrick*, L. R. 5 Ch. Ap. 241, Lord HATHERLEY L. C. said: "The principle laid down in the case of *Attorney-General v. Alford* appears to be the sound principle; namely, that the Court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have

THIS was an appeal by the defendant John Lush Alford from a decree made in the suit on further consideration and costs by Vice-Chancellor STUART on the 28th June, 1854. The following are the facts of the case.

The Reverend James Cutler, of New Sarum, by his will, dated the 11th May, 1839, and which was prepared by the defendant, who was his solicitor, after directing all his just debts, funeral, and testamentary expenses to be fully paid and satisfied, and bequeathing certain legacies to two servants therein named if living with him at the time of his decease, and a legacy of 100*l.* to his executor, gave and bequeathed to the defendant, his executors, administrators, and assigns, all and singular his, the testator's, household goods and furniture, plate, linen, china, and books, and all other articles and things belonging to him, the testator, which should be in and about his dwelling-house or elsewhere at the time of his decease, upon trust to permit and suffer his dear sister Elizabeth Cutler, spinster, then residing with him, to use and enjoy the same for and during the term of her natural life, and from and immediately after the decease of his said sister Elizabeth Cutler, upon trust to sell and dispose of the said household goods and furniture, plate, linen, china, books, and other articles and things, in such manner as to the defendant, his executors, administrators,

or assigns, should seem most advantageous: and the testator * 844 * thereby willed and directed that the produce of such sale should sink into and form part of the residue of his estate and effects; and the testator gave and bequeathed to his said sister Elizabeth Cutler, the interest and dividends, to accrue and become due on the sum of 9000*l.* stock in the 3*l.* 10*s.* per centum annuities then standing in his name in the books of the governor and company of the Bank of England for and during the term of her natural life; and from and immediately after the decease of his said sister, the testator directed that the said sum of 9000*l.* stock in the 3*l.* 10*s.* per centum annuities should be sold and converted into money by his executor: and he willed and

made, five per cent, or compound interest, as the case may be. If the Court finds that the money received has been invested in an ordinary trade, the whole course of decision has tended to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made."

directed that the produce of such sale and conversion should be applied in payment of the several charity legacies therein specified: and the testator by his will then willed and declared as follows: "As to the rest, residue, and remainder of my money and securities for money, personal estate, and effects whatsoever and wheresoever, I will and direct that my executor hereinafter named shall pay and apply the same to the relief of such persons resident within the parish of St. Edmund, in the said city of New Sarum, as may be sufferers from accidental losses or misfortunes, and which shall not have been occasioned in any way by their own imprudence or misconduct; and I will and direct that the said residue of my estate and effects shall remain in the hands of my executor, to be bestowed in such portions as the cases may deserve, with the joint consent and approbation of the rector and church-wardens for the time being of the said parish of St. Edmund. I make, nominate, constitute, and appoint the said John Lush Alford sole executor of this my last will and testament."

The testator died on the 23d March, 1840; and on the 21st May, 1840, the will was duly proved by the defendant. E. Cutler, the sister of the testator, died on the 24th * September, * 845 1840. The defendant collected, converted, and got in the testator's personal estate; and after discharging all the debts, and paying the legacies given by the will, he had a large residue remaining in his hands. The defendant, however, did not apply the residue to the charitable purpose indicated by the will, and did not inform the rector or church-wardens of the parish of St. Edmund, or any person connected with the parish, of the charitable bequest.

The will had been attested by three of the clerks of the defendant; and the information set forth that one of these, Mr. W. Beer, shortly before his death, which took place in December, 1851, made a statement relative to the bequest of the residue which led to inquiry on the subject. In December, 1852, C. M. Lee, one of the church-wardens of the parish of St. Edmund, applied to the defendant respecting the bequest, and the defendant thereupon wrote to C. M. Lee a letter, dated the 22d December, 1852, informing him that Cutler's Charity Fund with its accumulations then amounted to about 4400*l.*, and that the same was invested in consols and three and a quarter per cents. The defendant subsequently made suggestions for obtaining a scheme

for the administration of the charity ; but these not being acceded to, he, under the provisions of the Trustees Relief Act, transferred into Court the sum of 4592*l.* 2*s.* 2*d.*, 3*l.* 5*s.* per cent bank annuities, to an account entitled “ In the matter of the trusts of the will of the Rev. James Cutler deceased,” and on the 29th January, 1853, gave notice to the informant and relators of his having done so.

On the 5th February, 1853, the present information was filed by the Attorney-General at the relation of the rector and churchwardens of the parish of St. Edmund, praying against the defendant the usual administration accounts, and that the * 846 residue of the personal estate and * the accumulations thereof might be ascertained ; that if it should appear that the defendant had improperly retained any balances, he might be charged with interest thereon after such rate as the Court might direct, and that if it should appear that any loss had been sustained by reason of the defendant not having duly invested any part of the estate, he might make good such loss ; that it might be declared that the bequest in the will was a good charitable bequest, and that the residue might be applied according to a scheme to be approved of by the Court.

The case was heard by Vice-Chancellor STUART, on the 2d December, 1853, when a decree was made, directing the usual accounts, and an inquiry of what the residue of the testator's estate consisted, and what balances had from time to time been in the hands of the defendant, with a reference to approve of a scheme for the application of the residue upon the charitable trusts declared by the will, and an inquiry whether the fund in Court, or any other, and what sum, properly represented the residue.

The chief clerk, by his certificate, dated the 22d April, 1854, certified, among other things, that the residue of the testator's estate consisted of 2100*l.* new 3*l.* 10*s.* per cent annuities and 961*l.* 4*s.* 7*d.* cash, this being taken to be the state of the account on the 24th February, 1843 : he also certified that the following investments had been made by the defendant ; namely, 472*l.* 10*s.* on the 30th August, 1843, in the purchase of 500*l.* consols ; 285*l.* 15*s.* on the 7th September, 1843, in the purchase of 300*l.* consols ; 1250*l.* on the 17th April, 1847, in the purchase of 1436*l.* 15*s.* 7*d.* consols ; and 231*l.* 18*s.* 8*d.* on the 22d October, 1851, in the purchase of 236*l.* 13*s.* 4*d.*, 3*l.* 5*s.* per cent annuities : he also certified that the moneys belonging to the testator's estate received by the

defendant * were placed by him at his bankers to his pri- * 847
vate account, and mixed with his own moneys: he further
certified the balances of residue from time to time in the hands of
the defendant, and of what the residue at the time of making the
certificate consisted, and that the sum of stock transferred into
Court by the defendant with the dividend which had since accrued
on it properly represented such residue, and was in excess of it
by the sum of 95*l.* 7*s.* 5*d.*

The cause came on for hearing before the Vice-Chancellor on
further consideration, on the 30th June, 1854, when his Honor
made an order, declaring that 2100*l.*, 3*l.* 5*s.* per cent annuities,
part of the stock transferred by the defendant into Court, formed
part of the residue of the testator's estate, and ordering that the
residue of the stock in Court and the dividends which had accrued
due thereon should be transferred and paid to the defendant, and
declaring that the defendant was chargeable with interest at 5*l.*
per cent on the sum of 961*l.* 4*s.* 7*d.* cash in his hands on the 24th
February, 1843, and on the half-yearly dividends from time to
time receivable upon the 2100*l.*, 3*l.* 5*s.* per cent annuities, from
that day down to the date of the order, and ordering that annual
rests should be made, and the defendant be charged with interest
after the rate aforesaid upon the balances which should from time
to time appear to have been in his hands in respect of the sum
of 961*l.* 4*s.* 7*d.* and half-yearly dividends and balances, and the
interest thereon computed after the rate and in the manner afore-
said, and ordering the payment by the defendant of the amount
due in respect of principal and interest computed as aforesaid, and
declaring that the same, together with the 2100*l.*, 3*l.* 5*s.* per cent
annuities, constituted the residue of the testator's estate applicable
to the charitable purposes in the testator's will mentioned,
and directing, * among other things, that the defendant * 848
should not receive any costs up to and including the hearing
on further consideration, but reserving all subsequent costs.

The defendant appealed against this decree, except the direction
as to costs, the main questions raised being as to the charge of
the interest and the annual rests.

Mr. Malins and *Mr. G. M. Giffard*, for the defendant.

Mr. Bacon and *Mr. Surrage*, for the relators, supported the
decree of the Vice-Chancellor.

Mr. Giffard replied. (a)

The following cases were cited and commented on in the course of the argument: *Rocke v. Hart*, (b) *Raphael v. Boehm*, (c) *Crackelt v. Bethune*, (d) *Tebbs v. Carpenter*, (e) *The Attorney-General v. Solly*, (g) *Walker v. Woodward*, (h) *Stacpoole v. Stacpoole*, (i) *Williams v. Powell*, (k) *Court v. Robarts*. (l)

January 26.

THE LORD CHANCELLOR. — This is an information filed against the defendant, as the sole executor of a gentleman of the name of Cutler, who died in the year 1840. By his will he gave, &c.

[His Lordship here stated the will to the effect above set out.]

* 849 * The will was proved by the defendant in May, 1840, and he proceeded to collect the assets, and to pay the debts and legacies. After doing this it is found that there remained in his hands, in respect of residue, a sum of 2100*l.* new 3*l.* 10*s.* per cent annuities, and a sum of 961*l.* 4*s.* 7*d.* cash. What then took place was this: the defendant soon afterwards, not having any consols of his own, purchased in his own name a sum of 800*l.* consols, and he says he did this intending it as an appropriation of part of the sum of 961*l.* 4*s.* 7*d.*; for three years and a half he received no dividends on the consols, though he regularly received the dividends on the three and a half per cents; then at the end of 1847, being about four years after the residue had been ascertained, he laid out 1250*l.*, a sum greatly exceeding the amount of cash that upon any mode of calculation was then in his hands applicable to the charity, in the purchase of 1436*l.* 15*s.* 7*d.* consols. His statement is that he did this wishing to make the charity secure, and meaning to appropriate it all as belonging to the charity; he did not, however, ear-mark it, he only purchased so

(a) The reporter was unavoidably absent during the greater part of the argument.

(b) 11 Ves. 58.

(c) 11 Ves. 92.

(d) 1 J. & W. 586.

(e) 1 Madd. 290.

(g) 2 Sim. 518.

(h) 1 Russ. 107.

(i) 4 Dow, 209.

(k) 15 Beav. 461.

(l) 6 Cl. & Fin. 65.

much consols in his own name. The defendant did not receive any dividends upon this last purchase for five years and a half; but he then received the dividends on both the sums of consols. Shortly afterwards he was questioned as to the mode in which he had dealt with the residue, which it was his duty to have applied under the trusts of the will; and his attention being called to what he understood as a threat of proceedings to make him responsible for what he had got, he, thinking he had done wrong, caused a calculation to be made of what would have been the amount of three and a half per cents, or, as they had then become, three and a quarter per cents, if, instead of dealing with the residue in the irregular way he had done, he had always from time to time invested each sum as it was received in the purchase of additional three and a half per cents. He found that the * 850 amount would have been about 4400*l.*, 3*l.* 5*s.* per cents, and he thereupon took proceedings under the Trustees Relief Act to bring that amount into Court, thinking thereby to absolve himself from liability, and saying that he was ready, without reference to any past dealings, to appropriate that sum to the purposes of the charity and to ask the Court to frame a scheme for administering it. This took place in January, 1853, and a short time afterwards, in the month of February, the present information was filed charging the defendant as accountable for the residue, not upon the principle of any appropriation, but generally as having had the residue in his hands. Various proceedings in the suit took place, and finally, on the cause coming on upon further consideration, the Vice-Chancellor held that the defendant was chargeable with the residue, including as part of it the dividends which he should from time to time have received upon the 2100*l.* three and a half per cents, and that he was so chargeable with interest at 5*l.* per cent, with annual rests. An appeal was presented against that part of the decree, and has been heard before me.

The case lies in a very narrow compass, the only doubt being what is the principle applicable to it. There are two questions: first, one of fact, namely, what conclusion I am to come to relative to the conduct of the defendant; and, secondly, one of principle, namely, what is the principle by which, in the case of executors and trustees having money in their hands which they ought to invest and do not invest, the Court is regulated in dealing with them in respect of interest, whether in charging them with four or five per

cent or with compound interest at five per cent, or under some circumstances in making them liable for the amount of consols which would have been forthcoming if they had invested the fund properly.¹

* 851 * I have always felt this to be a very unintelligible question, for there is no definite rule applicable to it. Generally speaking, every executor and trustee who holds money in his hands is bound to have that money forthcoming; he is therefore chargeable with it, and is almost always to be charged also with interest at four per cent; it is presumed that he must have made interest, and four per cent is that rate of interest which this Court has usually treated it right to charge. In later times, however, the Court has charged executors with five per cent, and sometimes with compound interest.² This last, however, is a still more modern practice; and in *Raphael v. Boehm*, (a) where it had been done, Lord ELDON said that such terms had never before been inserted, and he hoped never would again be found in any decree, meaning, I suppose, that it was a harsh and not, generally speaking, a justifiable mode of dealing. I will state shortly why I do not quite understand the principle upon which the Court has proceeded in the cases to which I have referred, though I do not know that I shall not be able, nevertheless, satisfactorily to come to the conclusion at which I have arrived in the present case. In many of the cases it is stated that the Court proceeds *in pœnam* to punish the executor, but what is the meaning of this? why not punish him by making him account for more principal than he has received, if he is to be punished by having to account for more interest than he has received? What the Court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it. I do

(a) 11 Ves. 92.

¹ See to this point, *Hill Trustees* (3d Am. ed.), 550 in note; *Lewin Trusts* (5th Eng. ed.), 277 *et seq.*

² For cases showing when compound interest may be allowed against trustees, see *Hill Trustees* (3d Am. ed.), 551 in note; *Lewin Trusts* (5th Eng. ed.), 278, 279; 2 *Dan. Ch. Pr.* (4th Am. ed.) 1253; *Schieffelin v. Stewart*, 1 *John. Ch.* 620; *Barney v. Saunders*, 16 *How. (U. S.)* 542. Compound interest will only be given against an accounting party when he has employed the money in business. *Burdick v. Garrick*, L. R. 5 *Ch. Ap.* 233.

not think there is any other intelligible ground for charging an executor with more interest than he has * made, * 852 than one of those I have mentioned. Misconduct does not seem to me to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with any thing he did not receive, if it is not misconduct contributing to that particular result.

In the present instance, I observe that one of the grounds of misconduct relied upon by the Vice-Chancellor is, that the defendant did not communicate the matter to the rector and churchwardens of the parish. This was extremely improper conduct no doubt, but not in itself such conduct as enables me to make any alteration in the mode in which he is to be dealt with in point of interest. It is not misconduct that has benefited him, unless, indeed, it can be taken as evidence that he kept the money fraudulently in his hands, meaning to appropriate it to himself. In such a case I think the Court would be justified in dealing in point of interest very hardly with an executor, because it might fairly infer that he used the money in speculation, by which he either did make five per cent, or ought to be estopped from saying that he did not:¹ the Court would not there inquire what had been the actual proceeds, but in application of the principle, "*In odium spoliatoris omnia præsumentur*," would assume that he did make the higher rate, that is, if that were a reasonable conclusion. I must, however, say in fairness to the defendant here, that, looking to the circumstances, I cannot believe that this would be a fair interpretation of his conduct; he acted extremely improperly in not communicating the bequest, but the circumstances of the case show me that it is impossible to impute to him that he meant to appropriate the money to his own use.

[His Lordship here alluded to some of the facts on which he relied as supporting this conclusion.]

* Looking also at the defendant's conduct in reference to * 853 the investments, it appears that, having 961*l.* 4*s.* 7*d.* in his hands, he purchased 800*l.* consols, meaning it apparently as a

¹ See *Lewin Trusts* (5th Eng. ed.), 277; *Hill Trustees* (3d Am. ed.), 548 *et seq.* and notes; 2 *Dan. Ch. Pr.* (4th Am. ed.) 1253 in note (7).

security for the charity, and in three or four years afterwards he purchased another large sum with the same object. Nothing was, however, ear-marked as belonging to the charity, and it was a most improper course of dealing; but he states positively that these purchases were intended by him as an appropriation to the charity, and, strange as the transaction may seem, the circumstance of his not receiving the dividends leads me very much to the conclusion that he is truthful in that representation. My opinion on the whole of the evidence is, that the defendant was a gentleman misconceiving and grossly neglecting his duty, but still preserving the fund, and having it either invested in consols or having consols bought as a security for it. Under these circumstances, but I confess not without reluctance, I do not think that he can be charged with more than this,—he is accountable for the original money and for the dividends from time to time received upon 2100*l.* stock, with simple interest at four per cent. I should be very glad to say that he ought to pay five per cent, but I do not think I can; for I not only say that he has not made a profit, but the circumstances seem to me to demonstrate that he has not made a profit. That being so, he is accountable only for the sum of cash found to have been in his hands with simple interest thereon at four per cent, and for the 2100*l.* stock and the dividends received thereon with simple interest at four per cent on each dividend. If, however, the plaintiffs consider it more for their interest to take the consols purchased by the defendant, or the stock now in Court, they are at liberty to do so.

With regard to the costs, I think the defendant ought to
 * 854 pay all the costs of the information up to the hearing, * because it was occasioned necessarily by his own misconduct.¹

Mr. Malins, on the subject of costs and in reference to what the Vice-Chancellor had done, namely, not charging the defendant with costs, but giving him no costs up to the hearing, observed that that part of the decree was not appealed from.

The Lord Chancellor, however, refused to vary the decree on any other terms than on those of the defendant paying the costs up to the hearing, but gave him his option to have the appeal dismissed with costs.

¹ See *Frey v. Frey*, 2 C. E. Green (N. J.), 72, 75; *Bate v. Hooper*, 5 De G., M. & G. 345 and note.

After some further discussion, it was settled that the decree of the Vice-Chancellor should be varied in accordance with the judgment of the Lord Chancellor, the defendant paying the costs as above mentioned.

* DORMER v. PHILLIPS.

* 855

1855. March 7, 10. Before the Lord Chancellor Lord CRANWORTH.

The words "next heir" occurring in a will in a bequest of an annuity for life to be enjoyed by the next heir to a certain title and estate: *Held*, by reference to the context, not to have been used in their strict sense, but to mean the person next presumptively entitled to succeed to the title and estate.¹

THIS was an appeal from a decision of Vice-Chancellor KINDERSLEY, on a claim filed to determine a point of construction arising out of the will and codicil of the late Charles Lord Dormer.

The testator by his will, dated the 10th August, 1816, gave real estate to the use of his brother Evelyn Pierrepont Dormer for life, remainder to the use of the first, second, and every other son of Evelyn Pierrepont Dormer, successively in tail male, remainder to the use of Joseph Thaddeus Dormer (called in the will Joseph Dormer), only son of John Dormer, third brother of the testator's father, deceased, for life, remainder to the use of the first and other sons of Joseph Dormer successively in tail male, remainder to the use of the testator's uncle, James Dormer, for life, remainder to the use of Robert Dormer, the eldest son and heir of James Dormer deceased (who was the eldest son of the testator's uncle, James Dormer), for life, remainder to the use of the first and other sons of Robert Dormer in tail male, remainder to the use of Charles Dormer, the second son of James Dormer, deceased, for life, with remainder to his sons in tail male, remainder to the use of the plaintiff, Miles Dormer, the third son of James Dormer deceased, for life, remainder to his first and other sons in tail male,

¹ For cases showing the construction of the word "heir" by reference to the context, see 2 Jarman Wills (3d Eng. ed.), 64 *et seq.* A devise to the heirs of one who is stated in the will to be living is a valid disposition in favor of those who would be his heirs if he should then die. *Heard v. Horton*, 1 Denio, 165; see *Simms v. Garrot*, 1 Dev. & Bat. Eq. 393; *Bowers v. Porter*, 4 Pick. 198.

remainder to Robert Dormer, second son of the testator's said uncle James Dormer, for life, remainder to his sons in tail male, and remainder to the use of the testator's right heirs.

* 856 * The testator made a codicil to his will, dated the 1st April, 1816, which contained the following bequest: "I bequeath to Mr. Joseph Dormer, my next heir, after the death of my brother Evelyn Dormer without issue male, 150*l.* yearly for the term of his natural life, to date and become due from the day of my death; but in case he should become possessed of my title and estate, then it is my will that the said annuity should be paid to his next heir male, also for the term of his natural life, and so on successively to all the sons of my cousin, the late James Dormer, so that the next heir to the title and estate should always enjoy this annuity. I leave to my cousin Robert Dormer, eldest son of James Dormer above mentioned, 50*l.* a year from the day of my death for the term of his natural life, to devolve to his next brother, and so on in case of his becoming possessed of the annuity of 150*l.* above mentioned."

The testator died on the 2d April, 1819. Evelyn Pierrepont Dormer then became Lord Dormer, and entered into possession of the estates; he died on the 9th December, 1826, without issue. Joseph Thaddeus Dormer then became entitled to the estates and title, and was Lord Dormer at the time the claim was filed. At the death of Evelyn Pierrepont Dormer, in 1826, Joseph Thaddeus Dormer had no children, and Charles Dormer, the second son of James Dormer, was next heir presumptive to the title and estates; but at the filing of the claim Lord Dormer had several sons, the eldest of whom, the defendant John Baptiste Dormer, was born on the 22d May, 1830.

The annuity of 150*l.* was paid to Joseph Thaddeus Dormer until he became entitled to the estates and title on the death of Evelyn Pierrepont Dormer; it was then paid to Charles Dormer until 1852, when he died without issue.

* 857 * The annuity of 50*l.* was paid to Robert Dormer, named in the will, until 1821, when he died without issue; it was then paid to Charles Dormer until the death of Evelyn Pierrepont Dormer.

Under these circumstances, it became a question who was entitled to the arrears and future payments of the two annuities, and the claim in which the present appeal arose was filed by Miles

Dormer, who was the younger brother of Robert Dormer and Charles Dormer, and who claimed to be the next presumptive heir to the title and estates after the death of the present Lord Dormer without issue male: he contended that, according to the true construction of the codicil, he became entitled to the annuity of 50*l.* on the death of Evelyn Pierrepont Dormer and continued entitled to it until the death of Charles Dormer, and that he became on the death of Charles Dormer, and still continued to be, entitled to the annuity of 150*l.* This view of the case was disputed, it being suggested, with regard at least to the annuity of 150*l.*, that John Baptiste Dormer, the eldest son of the present Lord Dormer, was entitled to it as the next heir to the title and estates.

The cause came on before Vice-Chancellor KINDERSLEY in November, 1854, when his Honor held that neither the plaintiff Miles Dormer, nor the defendant John Baptiste Dormer, could take the annuity of 150*l.*, and that it had in effect ceased upon the death of Charles Dormer; and that the annuity of 50*l.* had also ceased at the same time, since there was no longer any one entitled to the annuity of 150*l.* From this decision the plaintiff appealed to the Lord Chancellor.

A very full report of the argument and judgment, together with a pedigree showing the state of the family, * will be * 858 found in the third volume of Mr. Drewry's Reports, p. 39, from which report the foregoing statement of the will and codicil has been taken.

Mr. Glasse, Mr. Selwyn, and Mr. Cairns, for the plaintiff, supported the appeal. — They submitted that the words “next heir,” as used in the codicil, meant next heir presumptive; and that it was clear from the whole tenor of the instrument they were not used by the testator in their strict technical sense.

Mr. Fleming, for the defendant John Baptiste Dormer, left the case in the hands of the Court, and took no part in the argument.

Mr. Amphlett, for the executors of Charles Gould, one of the residuary legatees under the will. — He submitted that the plaintiff was not entitled, and that the decision of the Vice-Chancellor was correct; he cited *Lord Deerhurst v. Duke of St. Albans.* (a)

(a) 5 Madd. 232.

He also insisted that the present was a stale demand, which the Court ought not to accede to, and mentioned *Campbell v. Graham*, (a) and the fortieth section of the Statute 3 & 4 Will. 4, c. 27.

Mr. Lloyd and *Mr. Terrell*, for F. T. Gould, a party in the same interest as C. Gould. — They cited *Leake v. Robinson*, (b) and submitted that, unless the construction put upon the codicil by the Vice-Chancellor was adopted, it was impossible to construe the instrument at all.

* 859 * *Mr. Greene* and *Mr. H. F. Jackson*, for the executors of the testator, took no part in the argument, but claimed such advantage as might be derived from the Statute of Limitations in answer to any demand for the arrears of the annuities.

Mr. Glasse replied, and in reference to the Statute of Limitations mentioned *Phillipo v. Munnings*. (c)

March 10.

The Lord Chancellor now delivered judgment. — His Lordship observed that this was one of those unsatisfactory cases in which the Court was called on to say what a testator meant, when it was perfectly clear that he did not know what he meant himself. All that the Court could do was to put a construction on the words actually used, and, dealing in this way with the present case, his Lordship, after considering the matter over several times, had come to be quite of the same opinion as the Vice-Chancellor.

[His Lordship here stated shortly the several facts above noticed, and also the terms of the will and codicil.]

The real question was what meaning was to be given to the expression in the codicil, “next heir,” as applied to the person who should always enjoy the annuity of 150*l*. His Lordship agreed with the Vice-Chancellor in thinking that the testator used the words in the same sense in which he had used them in an earlier part of the instrument, and this was clearly not in their strict sense, for he spoke of a person as “next heir” whose ancestor was

(a) 1 Russ. & M. 453; 2 Cl. & Fin. 429.

(b) 2 Mer. 364.

(c) 2 Myl. & Cr. 309.

still living, and “*nemo est hæres viventis* :” what he meant was that the person presumptively entitled * as next heir * 860 male to succeed to the title and estates should receive the annuity. On the death of Evelyn Pierrepont Dormer, Joseph Thaddeus Dormer was the person to succeed to the title and estates, and as he, Joseph Thaddeus, was then unmarried, Charles Dormer, as the next heir presumptive, was entitled to take the annuity of 150*l.*, and it was paid to him accordingly. Of the correctness of this there could be no doubt, but the question was, for how long was he to continue to receive it? He subsequently ceased to be next heir, for Lord Dormer married, and had children. It was impossible to speculate on what the testator had in his mind applicable to this state of things; the direction was, however, clear that the annuity was to be paid for life, and therefore Charles Dormer, though he ceased to be next heir, was still to receive it. He died in 1852, without issue, and the point to be determined was what was then to become of the annuity? Was his next brother, the present plaintiff, to take it? His Lordship thought not, for, in order to take, it was essential that he should answer the description of “next heir,” which he did not. The reference to the other sons of James Dormer was parenthetical; the testator’s meaning apparently was that any of them, to take, must be in the position of next heir to succeed to the title. No one was to take except as next heir male, and the plaintiff, the present appellant, was not next heir male: he therefore could not take, and the appeal must consequently fail.

* *Ex parte* GEORGE WOOD and THEOPHILUS CAR- * 861
RICK.

In the Matter of FREDERICK SUTTON.

1853. February 18. Before the LORDS JUSTICES.

The commissioner ought to make an order for the sale of property alleged by the assignees to be in the bankrupt’s reputed ownership, on their *ex parte* application, supported by *prima facie* evidence. (a)

(a) See the next case.

THIS was an appeal from the refusal of Mr. Commissioner AYB-TON to make an order for the sale of goods, (a) alleged by the assignees to have been in the order and disposition of the bankrupt, with the consent of the true owners.

On the 1st of January, 1851, the bankrupt, who carried on the business of a furnishing ironmonger at Kingston-upon-Hull, assigned to his sister all his household furniture, goods, chattels, stock in trade, and other his personal estate and effects whatsoever and wheresoever, to secure the repayment of 550*l.* with interest, therein expressed to have been advanced by her to him. The deed contained a power for the sister all times thereafter to enter into and upon the dwelling-house and premises of the bankrupt, and all other the places in which the assigned goods might be likely to be found, and to sell them as well as all other goods and chattels to be thereafter acquired by the bankrupt. After stating the bill of sale, and after stating circumstances to show that it was not made in consideration of a present advance or under pressure, the petition of appeal stated that the stock in trade, and all other

the personal estate assigned by the bill of sale, were at the
 * 862 time of the execution thereof, and afterwards * remained,
 in the possession, order, and disposition of the bankrupt, and that no part of it was ever delivered to or taken possession of by the bankrupt's sister until April, 1852, when the bankrupt, finding himself greatly in want of money, and unable to continue his business by reason thereof, informed his sister of the state of his circumstances, without any previous application from or communication with her, and recommended her at once to put the bill of sale in force; and thereupon arrangements were made, by or upon the suggestion or with the concurrence of the bankrupt, for the delivery up to his sister of all his stock in trade and other personal estate and effects, which accordingly took place on or about the 10th of April, 1852.

The assignees had moved before the commissioner for an order for the sale and disposal of the goods and chattels comprised in the assignment, pursuant to section 125 of the Bankrupt Law Consolidation Act, 1849, and examined the bankrupt *vivâ voce*. The commissioner, after taking time to consider the matter, on the 17th of January, 1853, refused to make any order, and adjourned

(a) See *Ex parte Heslop*, *ante*, Vol. I., p. 477.

the sitting until the 30th of March, 1853, so that the validity of the bill of sale and the proceedings might be tried at law. The prayer was for a declaration that such of the goods and chattels assigned by the bill of sale as remained in the possession of the bankrupt at the time of the delivery thereof by him unto his sister in April, 1852, were, at the time he became bankrupt, by her consent and permission, in his possession, order, or disposition as reputed owner thereof, or whereof he had taken upon him the sale, alteration, or disposition as owner; and that the same goods and chattels might be ordered to be sold and disposed of by the petitioners as assignees for the benefit of the creditors under the bankruptcy.

* *Mr. Hardy*, in support of the petition, read the examinations taken before the commissioner on the original application, and cited *Ex parte Barlow* (a) and *Quartermaine v. Bittleston* (b) on the authority of the latter of which cases he submitted that it was necessary to have an order specifically referring to the particular goods directed to be sold, and not an order directing all goods in the bankrupt's order and disposition generally to be sold. * 863

Their Lordships said, that, unless the order was made, the assignees could not try the question at law, and that the order ought to be made on *prima facie* evidence being adduced, as it was in this instance, and would determine no question. Their Lordships then made an order that the stock in trade and effects mentioned and referred to in the several examinations, and which were in the possession of the bankrupt on or about the 8th of April, 1852, and were afterwards removed from the premises of the bankrupt, by, or by the order of, the said Eleanor Frances Sutton, should be sold and disposed of for the benefit of the creditors under the bankruptcy, as having been in the possession, order, and disposition of the said bankrupt, as reputed owner thereof, at the time he became bankrupt, by the consent and permission of the true owner.

(a) 2 De G., M. & G. 921.

(b) 13 Com. B. 133; see also *Graham v. Furber*, 14 Com. B. 134.

• 864 * *Ex parte* GEORGE YOUNG, JONAS TILLOTSON
PATCHETT and WILLIAM EDWARDS HIRST.

In the Matter of JOHN ROEBUCK and WILLIAM ROEBUCK,
Bankrupts.

1853. July 4. Before the LORDS JUSTICES.

The 17th of the rules and orders in bankruptcy does not render it necessary or proper to serve on mortgagee notice of an application for an order for the sale of chattels alleged by the assignees to be in the bankrupt's reputed ownership. Such an order should be made on an *ex parte* application of the assignees showing a *prima facie* case.

THIS was also an appeal of the assignees, from the refusal of the commissioner (Mr. WEST), to make an order for the sale of goods alleged by the assignees to have been in the reputed ownership of the bankrupts.

The bankrupts were at the time of the bankruptcy woollen cloth manufacturers and lessees of a water fulling and scribbling mill, in which were shafting, gearing, engines, and machinery belonging to them, subject to an equitable mortgage in favour of the respondents.

In January, 1853, the appellants served the respondents with notice that application would be made to the commissioner for an order for the sale of the water-wheel, shafting, gearing, engines, machinery, and utensils upon the demised premises as being in the order and disposition of the bankrupts at the time of the bankruptcy.

The appellants and respondents were heard by the commissioner upon the application, which was thereupon dismissed, reserving the question of costs.

Mr. Bagshawe, in support of the petition, said that application had been made to the commissioner in the first instance *ex parte*; but that the commissioner required notice to be given to the respondents.

• 865 * The Lord Justice KNIGHT BRUCE said that the order ought to have been made *ex parte*, (a) upon a *prima facie*

(a) See *Ex parte* Barlow, 2 De G., M. & G. 921; and see the last preceding case.

case being shown to the satisfaction of the commissioner, and that persons not subject to the jurisdiction of the commissioner ought not to be served with notice of such applications.

Mr. Bagshawe referred to the 17th order, (a) and said that the notice had been served in compliance with what had been supposed to be the exigency of that order. He read the affidavit of the solicitor to the assignees, showing a *prima facie* case.

Mr. Rolt and *Mr. Aspland*, for the respondents. — Their Lordships held that the appellants were entitled to an order *ex parte*, and ordered the costs of all parties to be paid out of the estate.

* *Ex parte* THOMAS SPRAGUE.

* 866

In the Matter of EDWARD BREWSTER, a Bankrupt, and in the Matter of EDWARD BREWSTER and EDWARD WEST, Bankrupts.

1858. June 24. Before the LORDS JUSTICES.

A dissolution of partnership was advertised in the Gazette, and a circular sent in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner: *Held*, that the notice was insufficient to take the debts out of the reputed ownership of the firm.

The plant and stock in trade was taken possession of by the same partner, and used in his separate trade after the dissolution: *Held*, that it was in his separate reputed ownership.

THIS was an appeal from the decision of Mr. Commissioner EVANS, holding that certain property, which had belonged to the bankrupts jointly, was distributable as the separate property of

(a) “ That (unless the Court shall in any particular case otherwise direct) all applications to the Court in the exercise of its primary jurisdiction by virtue of ‘ The Bankrupt Law Consolidation Act, 1849,’ shall be, by way of motion, supported by affidavit, upon hearing which the Court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made unless upon the consent of such person or persons, duly shown to the Court:

[677]

one of them, as being in his order and disposition at the time of the bankruptcy.

Messrs. Brewster and West, the bankrupts, had carried on business as printers in partnership until the 6th of July, 1850, when the partnership was dissolved by a deed of dissolution, whereby, among other things, the partners covenanted to refer to arbitration all matters connected with the partnership business and the mode in which the affairs of the partnership should be wound up and settled.

On the same 6th of July, 1850, the bankrupts signed a notice of dissolution of the partnership, which was inserted in the London Gazette; and they also signed and sent to the debtors of the firm a circular, notifying to them the dissolution, and requesting them to pay their debts to Brewster.

After July, 1850, each of the partners carried on business separately on his own account, and Brewster retained and used in his business the plant and stock which had belonged to the firm.

* 867 * On the 28th of September, 1850, the arbitrator made his award, and (amongst other things) ordered and adjudged that the partnership should be deemed to have ended and been determined on and from the 30th of June then last past; that Brewster should pay and receive all debts, and enter into a bond to West, in the penal sum of 3000*l.*, to save West harmless against all claims and demands arising out of the partnership; that West should, after the payment to him thereafter mentioned, deliver up to Brewster all books, papers, and writings relating to the partnership; that Brewster should pay the sum of 628*l.* 17*s.* 10*d.* to West within two months after notice in writing given to Brewster of the arbitrator's award; and that West should accept and receive that sum in full discharge of his share in the partnership estate and effects. And the arbitrator determined that, save as aforesaid,

or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby, four clear days at least before the day named in such notice as the day when the motion is to be made: provided, however, that the Court may, if it shall think fit, in any case where the party or parties to be affected by the order, or any of them, shall not have been duly served with a notice of the motion for such order, make an order calling upon the party or parties to be affected thereby, to show cause, at a day to be named by the Court in such order, why such order should not be made."

neither Brewster or West had upon the 30th of June, 1850, any claim or demand upon or against the other of them in respect of or in relation to the copartnership stock in trade, machinery and effects, debts, accounts, and differences, or otherwise.

On the 30th of September, 1850, West gave notice in writing to Brewster of the award, and made application to Brewster for the payment of the 628*l.* 17*s.* 10*d.*, which was directed by it to be paid.

On the 19th of November, 1850, Brewster was declared bankrupt; and on the 22d of November a joint adjudication was pronounced against both the bankrupts.

By an order of the commissioner, dated the 22d of March, 1853, the creditors' assignee of the separate estate of Brewster was ordered to show cause why the official assignee should not be directed to carry over to the credit of the joint estate the several sums of money received * and to be received in * 868 respect of the debts of the late firm.

Accordingly, on the 11th of May, 1853, the parties appeared before the commissioner, who, on the 26th of May, delivered his judgment, declaring that that which had been partnership property was distributable among the separate creditors of the bankrupt Brewster, as being in his order and disposition.

From this decision the trade assignee under the joint adjudication appealed.

Mr. Follett and *Mr. Lucas*, in support of the appeal. — The award was insufficient to change the property, especially as the payment which was directed by it as a condition precedent had never in fact been made. The notice in the Gazette merely notified the hand to receive the credits of the firm, and could not affect the reputed ownership. And as to the plant and effects, the mere retention of them by one partner after a dissolution and separation has never been held sufficient to change the reputation of ownership.

They referred to *Hunter v. Rice*, (a) *Ex parte Wheeler*, (b) and *Ex parte Clarkson*. (c)

Mr. Swanston and *Mr. Aspland*, for the respondent, the trade assignee of Brewster. — There was a complete conversion of the

(a) 15 East, 100.

(b) Buck, 25.

(c) 4 Dea. & Ch. 56.

partnership into separate property before the bankruptcy. The property had passed, but the time for the payment of the consideration money had not arrived at the time of the bankruptcy. The property was therefore really separate, and the reputation of ownership here coincided with the true title.

* 869 * They referred to *Ex parte Enderby*, (a) *Ex parte Arbouin*, (b) *Ex parte Ruffin*, (c) *Ex parte Fell*, (d) *Ex parte Williams*, (e) *Joy v. Campbell*, (g) *Ex parte Burton*, (h) *Ex parte Usborne*, (i) *Ex parte Cooper*. (k)

THE LORD JUSTICE KNIGHT BRUCE. — With regard to that part of the appeal which refers to the debts due to Brewster and West, we are of opinion upon the evidence that nothing had been done to take them out of the reputed ownership of the original creditors. Even if the advertisement and circular had come in sufficient time to the knowledge of the debtors, they would not of necessity have imported an assignment. They would not of necessity have imported more than agency. The parol evidence is very slight, and it appears to me that the case of notice to the debtors wholly fails. Therefore, whatever may have been the agreement as to the debts between the creditors themselves, the section of the statute that has been so frequently adverted to renders it necessary to treat them as part of the joint estate.

With regard to the plant and stock, I confess that I am not without some degree of doubt, — a doubt arising from the circumstance that my mind is not satisfied that there was a complete delivery (so far as the subject was capable of it), and from the circumstance that there was here not a secret or dormant, but an open and avowed and notorious partnership, followed for a time by so carrying on of the business by one of the partners alone. But, * 870 doubting as I do upon this point, I cannot * say that I have a sufficiently strong opinion upon it to warrant me in dissenting from the conclusion of the learned commissioner. It is a conclusion that, I repeat, is very possibly correct. If I were satis-

(a) 2 B. & C. 389.

(b) De Gex, 359.

(c) 6 Ves. 119.

(d) 10 *Ib.* 347.

(e) 11 *Ib.* 3.

(g) 1 Sch. & Lef. 328.

(h) 1 Glyn & Jam. 207.

(i) *Ib.* 358.

(k) 1 Mont., D. & De G. 358.

fied in my own mind that the conclusion was wrong, I should be bound so to declare ; but I am not so satisfied, and, therefore, cannot give my voice for disturbing that part of the decision.

THE LORD JUSTICE TURNER. — One question which we are called upon to decide in this case is, whether in truth any concluded agreement was come to between these two partners as to the division of the partnership assets. Looking at the deed of dissolution of the 6th of July, 1850, I find it reciting that the parties have mutually agreed to dissolve the partnership, and in pursuance of that agreement have signed the notice ; and, further, that it has been agreed that Brewster shall have the premises for the remainder of the term, and pay and satisfy the rent and covenants ; and that each of the parties shall be at liberty to carry on the business of a printer ; and that it shall be referred to arbitration to ascertain the value of the copartnership effects, and of the share of West therein, and to decide what in respect of such share shall be paid by Brewster, and how and when payment shall be made, and in what manner the affairs shall go on. This recital, carried into effect by the operative part of the deed, is to my mind convincing evidence of an agreement that Brewster should be sole owner of this property, and that the only question was, what he was entitled to have paid to him, and how and when. The deed proceeds upon the notion of the sole ownership of Brewster.

When we have arrived at this conclusion as to the operation of the deed between the parties, there arises a * ques- * 871
tion as to the debts, viz., what was there to take them out of the operation of the statute as to reputed ownership ? At the time of the dissolution, the debts belonged to the partners jointly. They must have so continued until notice was given to the debtors that the debts which had been joint property had become the sole property of the one. Now there is nothing in the shape of such notice, except the fact that authority had been given by both partners to the debtors to pay the amount of their debts to one of these partners. I take it that a mere authority of that description would not alter the property between the two. Therefore I think that, as to the debts, there was not here sufficient to take the case out of the operation of the statute as to reputed ownership. As to the stock in trade and plant, the case stands on a different footing. On the 6th July, 1850, sole possession was taken by Brewster. He

carried on a separate trade ; the name was changed ; and the other partner was also carrying on a separate trade in a different place. I think that these circumstances were sufficient to take this part of the property out of the reputed ownership of the two. It is not material how long the separate possession continued, provided it was clear. I think, therefore, that the decision of the commissioner must be confirmed as to the plant and stock, and altered as to the moneys which were due to the firm.

Each estate was directed to bear its own costs.

* 872 * In the Matter of a PETITION for Arrangement, &c.

ANONYMOUS.

1853. July 4. Before the LORDS JUSTICES.

A petition for arrangement under 12 & 13 Vict. c. 106, § 211, dismissed on the application of the petitioning trader with the consent of the creditors, although he had complied with the statutory regulations.

THIS was a motion by way of appeal from the dismissal, by Mr. Commissioner GOULBURN, of a petition, presented by the appellant, praying for the dismissal of a petition presented by the petitioner, for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849. The Act only provides (§ 223) for the dismissal of a petition presented under the 211th section, in case of non-compliance on the part of the petitioning trader with the requisitions of the Act. In the present case he had complied with these requisitions, but did not desire to proceed further under the Act. The creditors all consented to the application.

Mr. Bagley supported the motion.

Their Lordships ordered that the order of Commissioner GOULBURN should be discharged, and that the petition for arrangement, presented to the Court of Bankruptcy, by the appellant on the 3d of June, 1853, should be, and the same was by the order dismissed.

* *Ex parte* GEORGE EDWARD DINSDALE. * 878

In the Matter of GEORGE EDWARD DINSDALE.

1853. November 19. Before the LORDS JUSTICES.

A summons to a person supposed to be capable of giving information touching the bankrupt's estate will not in general be granted on the application of the bankrupt, without the concurrence of the assignees.

THIS was the appeal of the bankrupt from the refusal of Mr. Commissioner West, to issue a summons to a person whom the bankrupt alleged to be capable of giving information respecting the bankrupt's estate.

The petition of appeal alleged that the bankrupt, by indentures of lease and release, dated respectively in or about the 15th and 16th of July, 1813, assured to Timothy Hutton and his heirs a freehold estate at Middleham, in Yorkshire, upon trust to sell and dispose of the same in manner therein mentioned, and out of the proceeds, after payment of expenses, to pay to John Hutton and his partners, who were the bankrupt's bankers, the sum of 1379*l*. The petition further alleged that, immediately after the date of the deed, Timothy Hutton, the trustee, sold the estate, which produced more than enough to discharge the costs and expenses of the trust, and the sums made secure by the trust deed, leaving for the benefit of the bankrupt's estate a large surplus.

In May, 1826, a commission of bankruptcy issued against the appellant.

On the 7th of November, 1850, the bankrupt required Mr. Hutton, by a notice in writing, to make out and deliver to him or to the official assignee an account of his receipts and payments in respect of the trusts, and to produce vouchers for all payments and allowances.

* The petitioner deposed that he verily believed that if * 874 such accounts were truly and properly rendered and investigated, it would appear that after payment of all the debts and expenses mentioned and referred to in and by the indenture of the 16th of July, 1813, a large balance was due from Timothy Hutton to the petitioner's estate, more than sufficient to pay the creditors, who had proved their debts under the commission, 20*s*. in the pound, and leave to him a very considerable overplus.

Mr. Sturgeon, in support of the petition, relied upon the 120th section of the Bankrupt Law Consolidation Act.

Mr. J. H. Palmer appeared for *Mr. Hutton*, who had been served with the petition. — The petition had not been served on the official, who was the only assignee.

The Lord Justice KNIGHT BRUCE was of opinion that there was not the slightest ground shown for the interference of the Court with the discretion exercised by the commissioner; and that it was not, in general, competent to a bankrupt to apply for a summons, under the 120th section of the Bankrupt Law Consolidation Act, without the concurrence of his assignees. As the official assignee, who ought to have been, had not been served, and as *Mr. Hutton*, who ought not to have been, had been served with the petition, his Lordship thought that the appeal must be dismissed, and *Mr. Hutton's* costs paid by the bankrupt.

The Lord Justice TURNER concurred.

In the Matter of JAMES WOOD, against whom a Trader Debtor Summons has been issued.

1854. February 17. Before the LORDS JUSTICES.

It is not imperative upon the commissioner to require a bond under the 12 & 13 Vict. c. 106, § 78, or the general orders, but is a matter within his discretion, having regard not only to the solvency of the alleged debtor, but to all the circumstances of the case, including the probability of success in an action for the demand.

When, therefore, the demand was made in respect of differences in purchases and sales of a commodity arising from the mere turn of the market, neither party having or intending to buy or sell the commodity itself, it was held not to be a proper case for requiring a bond.

Quære, whether such a demand could be enforced or was not a gambling transaction.

THIS was a petition of appeal from a decision of Mr. Commissioner FONBLANQUE, requiring the appellant to enter into a bond, under the 78th section of the Bankrupt Law Consolidation Act.

On the 24th of January, 1854, the appellant was served by, or on behalf of, the respondent, Mr. William May Simonds, with particulars of demand and notice, requiring payment of 2085*l.* 3*s.* 2*d.*, being the balance due upon an account of purchases and sales of various large quantities of tallow; and on the 26th he was served with a summons to attend the Court of Bankruptcy, Basinghall Street, on the 1st of February, 1854, to answer the demand.

The appellant attended at the return of the summons, and deposed that he verily believed he had a good defence, upon the merits, to the demand; and thereupon the respondent, by his attorney, insisted that the appellant ought to be required to give a bond, with two sureties, to abide the result of an action for the recovery of the demand.

The commissioner required the respondent to show * that * 876 the alleged debt was in jeopardy, or that there was reason to believe that, if judgment were recovered against the appellant for the amount claimed, he would be unable to pay this, in addition to his other engagements.

Evidence was accordingly gone into, the result of which, according to the affidavit made in support of the appeal was, that in or about December, 1852, the respondent commenced speculating in tallow, as broker, for the appellant. That the first speculation resulted in a gain of 100*l.*, but that subsequently, in consequence of the state of Eastern affairs, heavy losses had resulted. That the claim of the respondent was for the largest of these losses, and that there were two other similar claims. That the course of dealing was as follows: one party agreed to buy a certain quantity of tallow of the other, deliverable at a future period, between certain specified times, generally one, two, or three months apart; for instance, between the 1st of October and 31st of December, then next. That a bought and sold note was signed by a broker, on behalf of each party. That the other party, to cover himself, subsequently entered into a counter contract to sell to the person from whom he had purchased a like quantity of tallow, deliverable also between the same periods. That when the period for delivery arrived, it was open to either party, according as the turn of the

market, happened to be in his favour, to give notice to the other that he was ready to deliver the tallow in pursuance of his contract; and the other thereupon gave a counter notice that he was ready to deliver the like quantity of tallow under his contract, and upon this a difference was ascertained, according to the different prices at which the contracts had been respectively entered into,

and such difference was to be received and paid accordingly. That no tallow was actually delivered, nor delivery warrants made out, nor any tallow actually purchased for the fulfilment of the said contracts, nor otherwise dealt with, except by the exchange of bought and sold notes. That the transactions were time bargains, intended to be settled by differences, and not by actual delivery; and that the claim of the respondent was for differences upon the supposed delivery and redelivery of the same tallow, in pursuance of time bargains.

The appellant deposed before the commissioner that, except in respect of debts thus incurred, the appellant was worth a considerable sum beyond the amount of his debts, but not sufficient to pay the demands of the respondent, and of two other persons with whom he had had dealings of the above descriptions, if they were just and legal debts, which the appellant was advised they were not. He further deposed that he was unable to find sureties to the amount of the demand of the respondent, and that the effect of ordering him to give a bond, with sureties, would be to compel him to commit an act of bankruptcy, though he was, as he verily believed, perfectly solvent.

He submitted to the commissioner, first, that the claim of the respondent was, upon the face of it, as shown by the particulars of his demand, and by the evidence of his own witness, contrary to the provisions of the Gaming and Waging Act, and therefore absolutely void, and would be incapable of being proved in bankruptcy, or of supporting an adjudication, and that the commissioner ought not to exclude this from his consideration; and, secondly, that even if this had not been the case, the test by which the Court should be guided in ordering or refusing to order

a bond to be given ought to be the general solvency or insolvency of the trader summoned, apart from the particular claim made and denied, and not his inability to pay the amount claimed and denied in addition to his ordinary engagements; that the contrary construction would put it in the power of

any one who would make an unconscientious and extravagant demand to make any other man a bankrupt in fourteen days.

The commissioner, by the order under appeal, ordered the appellant, within twenty-one days to enter into a bond according to the form contained in Schedule (K) to the Act, in the sum of 3085*l.* 3*s.* 2*d.*, with such two sufficient sureties as the Court should approve of, to pay such sum or sums as should be recovered, together with such costs as should be given in a then pending action, or of any part thereof in respect of which the deposition of the respondent had been made.

Mr. Rolt and *Mr. Hardy*, in support of the appeal. — The contracts in respect of which the respondent is suing are void as gambling contracts within the meaning of the Statute 8 & 9 Vict. c. 109, § 18, which enacts “that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.” They cited *Grizewood v. Blane*. (a)

Mr. J. H. Palmer, for the respondent. — The Bankrupt Law Consolidation Act and the 87th * order are impera- * 879
tive upon the commissioner, and leave him no discretion as to requiring a bond with sureties. The contracts in question are not void under the Act relied upon, for the demand cannot be termed “a sum of money alleged to be won upon any wager;” on the contrary, the evidence shows that the contracts were entered into *bonâ fide*, and according to the usual course of trade.

To constitute a valid contract for the sale of goods to be delivered at a future day, it is not necessary that the vendor should at the time have the goods in his possession, or have entered into any contract to buy them. *Hibblewhite v. M'Morine* (b). In *Grizewood v. Blane* there was clearly a mere gambling transaction.

THE LORD JUSTICE KNIGHT BRUCE. — It is not necessary on this occasion to give an opinion upon the question whether there is or is

(a) 11 C. B. Rep. 538.

(b) 5 M. & W. 462.

not any debt due from Mr. Wood to Mr. Simonds, in the sense in which that word is used in Courts of justice; namely, whether there is any right of action existing between them. But, assuming for the purpose of argument (without asserting or denying) that there is any such debt, it is right, as it appears to me, to inquire into the origin and nature of the demand. If there has been any valuable consideration for it, it certainly has not been an onerous consideration. Mr. Simonds has not substantially parted with any of his money or property or come under any serious inconvenience with reference to the alleged debt. It is a debt, if a debt at all, which he has been lucky enough to obtain by the mere turn of the market, to use an expression not uncommon in cases of this nature.

* 880 * Considering, therefore, the origin and nature of the alleged debt, as well as the doubtfulness of the question, for I think it a doubtful question, whether there is any debt at all, if I am called upon to exercise a discretion under the 79th section of the Bankrupt Law Consolidation Act, as to requiring or not requiring sureties, I must exercise it in favour of the alleged debtor. According to the true construction of the 79th section, there is, I apprehend, a discretion; and it is not, I think, in every case where there is proof offered of a debt being due on the one hand which is denied on the other side, that of necessity a bond is to be given. In coming to that conclusion, I have not been influenced by the circumstance that under the general orders, as I read them, if a bond is given it must of necessity be given for the amount prescribed. Probably it is so; but, whether taking those orders into account or not, I am of opinion, in the exercise of a judicial discretion in the particular circumstances of this individual case, a discretion which we are bound to use, that the sureties ought not to be required.

THE LORD JUSTICE TURNER. — I entirely concur in the opinion expressed by my learned brother as to the construction to be put upon the statute and the orders. I think that the 79th section of the statute gives power to the Court to require sureties, but in terms vesting in the Court a discretion as to whether the case is one requiring sureties to be given or not,—a discretion to be exercised, not merely with reference to the solvency or insolvency of the alleged debtor, his capacity or incapacity to answer the debt,

but with reference to all the circumstances of the case, the nature, origin, and constitution of the alleged debt, and the probability of an action to recover it resulting or not resulting in a successful termination. Having * regard to all these circum- * 881 stances I am of opinion, that in this case the security prescribed by the statute and called for by the orders ought not to be required.

Ex parte SIR ROBERT JOHN HARVEY, ANTHONY HUDSON, and ROBERT JOHN HARVEY HARVEY.

In the Matter of EDWARD BLAKELY, a Bankrupt.

Ex parte THOMAS OSBORNE SPRINGFIELD and Another.

In the same Matter.

1854. January 29, 30, 31. February 10, 28. Before the LORDS JUSTICES.

A firm were holders of a joint and several promissory note made by a father and son. The son assigned all his property to trustees for the benefit of his creditors, who were expressed to be parties to the assignment and to be named in a schedule, and the deed purported to contain an absolute release of the debts without any reservation of rights against sureties. One of the trustees was a partner in the above-mentioned firm, and the deed was executed by him and the other trustees, but not by any other creditor. It was also executed by the son, with the privity and concurrence of the father. Upon its execution as an act of bankruptcy, an adjudication was pronounced against the son: *Held*, that even assuming the father to have joined in the note as a surety merely, and the partner to have executed the deed as a creditor and not merely as a trustee, the father's liability was not discharged. It is not universally necessary, in order to reserve on a composition deed remedies against sureties, that the reservation should be expressed in the deed.¹

THESE were two appeals from the rejection of proofs under the following circumstances:—

The bankrupt, Edward Blakely, carried on business as a silk

¹ See *Wyke v. Rogers*, 1 De G., M. & G. 408 and cases in notes (2) & (3); *Owen v. Homan*, 3 M'N. & G. 378, 406, and note (1); S. C., 4 H. L. Cas. 997, 1038.

mercator at Norwich. His son, Edward Theobald Blakely, also carried on business in the same city as a shawl manufacturer. In March, 1850, the son applied to Messrs. Harvey & Hudson (the appellants in one of the two appeals), who were bankers at Norwich, to lend him money for the purposes of his business, and they agreed to do so by opening a banking account with him and allowing him to draw upon the same from time to time to the extent of 500*l*.

* 882 * On the 28th of November, the son, who had drawn on the bankers beyond the limit agreed upon, induced them to continue the credit, and to make further advances on the following guarantee, which was signed by his father, the bankrupt: —

“ I, the undersigned Edward Blakely, of Norwich, silk mercer, for and in consideration of Messrs. Harveys & Hudsons, bankers at Norwich, having at my special instance and request agreed to continue open an account which Edward Theobald Blakely now hath with them, and to make further advances to the said Edward Theobald Blakely, do hereby undertake and agree to guarantee the payment to the said Messrs. Harveys & Hudsons, on demand of the sum or sums of money, together with interest, commission, and the usual banking charges upon the same as they may hereafter advance or pay to or for the said Edward Theobald Blakely, so that the whole sum to be recoverable under this guarantee, which shall be deemed and taken from time to time and at all times hereafter to be a continuing guarantee and security, shall not exceed the sum of 2500*l*.”

Another agreement was subsequently come to between the father, the son, and the bankers, to the effect that the bankers should advance to the father himself 750*l*. on a mortgage security, and should give up to the father his guarantee of the 28th of November, 1850, and also two bills of exchange, dated respectively the 10th of February and the 10th of December, 1852, for the sums of 300*l*. and 230*l*. drawn by the son upon the father, and discounted by the bankers; and that thereupon, and in consideration thereof, the father and son should give their joint and several promissory note for 3030*l*., being the aggregate amount of

* 883 the bills of exchange and 2500*l*. * part of the balance then remaining due to the bankers upon the son's banking

account; and that the bankers should hold certain railway shares as security for the residue of the balance of the son's account. Accordingly the guarantees and bills of exchange were delivered up, and the father and son gave the bankers a joint and several promissory note, which was as follows: "Norwich, 14th December, 1852. On demand we jointly and severally promise to pay to Messrs. Harveys & Hudsons, or order, 3030*l.* value received. EDWARD BLAKELY. EDWARD THEOBALD BLAKELY."

On the 29th of March, 1853, the son executed a trust deed, expressed to be made between himself of the first part, Thomas Osborne Springfield (the appellant in the other appeal), Robert John Harvey Harvey (one of the partners in the bank), and William Stark, as trustees for themselves and the rest of the creditors of the son, parties thereto of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of the son of the third part. By this deed, reciting that the son was indebted unto the parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereto, and was unable to pay the same, and had agreed to assign all his estate and effects unto the trustees for the benefit of his creditors as thereafter mentioned, it was witnessed that in pursuance of the said agreement, and in consideration of the premises, and of the nominal consideration therein mentioned, the son assigned unto the trustees, their executors, administrators, and assigns, all his stock in trade and other personal estate and effects, to hold the same upon trust, to collect and receive or sell and dispose of the same in manner therein mentioned, and out of the moneys to be received by virtue thereof to pay all the costs and expenses * of that indenture, and relating to the premises, or the * 884 trusts thereby created, and in the next place to pay, retain, and satisfy, ratably and proportionably, and without any preference or priority, to themselves (the said trustees and their partners) and the other persons, parties thereto of the third part, the several debts or sums set opposite to their respective names in the schedule thereto subject to a proviso thereafter contained for verification of the amounts thereof, and to pay the residue, if any, of the said moneys unto the son, his executors, administrators, and assigns. After the usual powers and provisions for carrying the arrangement into effect, it was thereby lastly witnessed, that in considera-

tion of the premises and of the assignment thereinbefore contained, the several creditors, parties thereto of the second and third parts, subject to the proviso next thereafter contained, released and discharged the son of and from all and all manner of debt and debts, actions, suits, claims, and demands whatsoever. And the indenture contained a proviso for avoiding the same in case of the concealment by the son of any part of his estate and effects to the value of 20*l.*, except the linen and wearing apparel of himself and his family.

This deed was executed by the son and by the three trustees, but not by any other creditor, nor did it in the body, or in a schedule, contain the name of any other creditor or the amount of any debt. No creditor received any dividend under it, and the appellants' case was that the trustees only executed the deed in that character, and not as creditors, and that they did not intend thereby to release any debt.

* 885 The result of the evidence (which was conflicting) * was that the father was privy to and concurred in the execution of this deed by the son and the trustees.

On the 6th of April, 1853, the following letter was sent by a creditor and friend of the son to Mr. Springfield, one of the trustees under the deed: —

“ Dear Sir, — The creditors of Mr. E. T. Blakely, manufacturer, through you as their trustee, having this day agreed to accept a composition of ten shillings in the pound in satisfaction and discharge of their respective debts, amounting to 6022*l.* (the total amount of all his liabilities, as per statement annexed), I hereby undertake to grant acceptances at four months, amounting in the whole to 3011*l.*, being ten shillings in the pound upon the above-mentioned sum of 6022*l.*, on the following conditions: 1st. That all the goods now in Mr. Blakely's hands and still to be made be forwarded when completed to me or my order. 2d. The bills to be drawn upon me against the amount of the invoice price of consignment of above goods and of the others still to be manufactured less ten per cent, such bills to date from the time of the delivery of such goods to me, such acceptances to continue until they amount to the above-mentioned sum of 3011*l.* sterling. The acceptances to be made payable to Thomas O. Springfield, Esq., a

trustee for himself and the other creditors of Mr. E. T. Blakely. I remain, dear sir, yours most respectfully, JAMES G. FROST."

On the same 6th of April, Mr. Springfield returned the following answer : —

"To Mr. J. G. Frost. Sir, — We, the undersigned (being trustees appointed under a deed of assignment, dated March 29th, 1853, executed by Edward Theobald * Blakely, of * 886 Norwich, shawl manufacturer, to us on behalf of ourselves and the rest of the creditors of E. T. Blakely), hereby agree, on behalf of ourselves and the other creditors, to accept the dividend of ten shillings in the pound, to be payable and paid in the manner and form proposed in the within-written letter. We remain, &c., for self and co-trustees, T. O. SPRINGFIELD."

According to the evidence in support of the appellants' case, the letter of Mr. Frost was shown to the trustee, Mr. Harvey, by the other trustee, Mr. Springfield, who, on behalf of the bankrupt and his son, requested the bankers to concur in the arrangement therein proposed, informing them that in such case the father would pay the residue of the debt of 3030*l.* above the amount of the composition ; but the bankers declined giving their concurrence without the consent in writing of the father that their right to enforce payment of the sum of 3030*l.* from him should remain unprejudiced, and that the father should remain liable as principal debtor to them for the whole of the debt. On the 7th of April the father sent to the bankers the following letter : —

"Crown Bank, Norwich, 7th April, 1853. Dear Sirs, — I request you will take ten shillings in the pound on my son's estate. As to the residue, I hope to be able to satisfy you myself."

On the 21st April, 1853, another agreement was drawn up, and expressed to be made between Thomas O. Springfield, Robert John Harvey Harvey and William Stark, as trustees acting under the indenture of assignment of the 29th March, 1853, of the first part, the several creditors of Edward T. Blakely of the * second part, and James G. Frost of the third part, * 887 whereby Mr. Frost agreed forthwith to deliver to the trus-

tees his bill of exchange for 314*l.*, being a balance therein recited to be due from him, and (to the extent of 3600*l.*) to take of the trustees all the manufactured goods then being in and upon the manufactory and premises of the bankrupt's son in Norwich; and also all such goods as might be manufactured by the trustees, as therein mentioned, upon certain terms therein specified, and to deliver to the trustees his acceptances for the price thereof payable as therein mentioned, to the extent of 3600*l.*, and the trustees, in consideration of the due performance of such agreement as aforesaid on the part of Mr. Frost, and with the consent of the creditors, testified by their signing the now stating agreement, thereby transferred to Mr. Frost all the working plant and machinery, materials and goods, late of the son, then being in the manufactory and premises, for his own absolute use, subject to certain provisions in the agreement contained.

This agreement was signed by Thomas O. Springfield, Robert John Harvey Harvey, William Stark, and some of the creditors, but according to the evidence on behalf of the bankers, Mr. Harvey signed the same only as a trustee, and not on behalf of his partners, from whom he had no authority to sign either that document or the indenture of the 29th March, 1853.

The petition for adjudication against the father was filed on the 9th April, 1853, by two creditors, named William Lycett and David Davies.

On the 28th April, 1853, a petition for adjudication of bankruptcy was filed against the son, who was also declared a bankrupt.

* 888 * The bankers attended before the commissioner acting in the prosecution of the bankruptcy of the father, and tendered a proof for 2857*l.* 7*s.* 6*d.*, being the balance due on the 3030*l.* and interest secured by the promissory note.

A proof was also tendered by Mr. Springfield for the amount of his debt, but the commissioner rejected both proofs, on the ground that the bankers and Mr. Springfield had concurred in the composition deed, and that the father, being a surety for the debts due from the son to the appellants, was thereby released.

From these rejections the two appeals were brought, and were separately argued; but as the arguments were to a considerable extent the same, they are blended in this report.

A considerable portion of the evidence and of the argument

related to the question whether the father was a surety or a principal creditor ; but, as the judgments proceed on the assumption of the father being a surety without determining the question, these portions of the case are omitted.

Mr. Swanston, Mr. Rolt, Mr. Bazalgette, and Mr. Prentice, in support of the appeal of the bankers.

Mr. Swanston and Mr. Palmer, in support of the appeal of *Mr. Springfield*. — First, there was no absolute release in this case. The deed of the 29th March, 1853, was not executed by any creditor in that character. The evidence shows clearly that the appellants only executed it as trustees, and had no authority from their respective partners to execute it as creditors. But even supposing the deed to have been capable of operating as a release, if it had * remained in force, that effect was de- * 889 stroyed on its becoming void and inoperative by reason of adjudication of bankruptcy being made upon it. Thus, if a tenant is lawfully evicted, he cannot be sued on a covenant for payment of rent. When the petition for adjudication was filed the deed was as if it had never existed.

Moreover, the 228th section of the Bankrupt Law Consolidation Act provides that no creditor who is party to a deed of arrangement under the 224th and following sections, shall be prejudiced or affected as to his right or remedy against any person other than the trader. Although this deed was not executed by six-sevenths of the creditors, yet every deed of the description mentioned in the Act may be considered in progress towards execution by six-sevenths of the creditors, and the 228th section was probably intended to meet the difficulty which might have arisen from a creditor releasing the debtor in the expectation that the deed would be executed by six-sevenths of the creditors when that expectation was not fulfilled.

[THE LORD JUSTICE TURNER. — Suppose a deed was executed by five-sevenths, and then a creditor petitioned for adjudication upon it, and afterwards another one-seventh executed the deed ?]

The adjudication would then be good, but the hardship, which would have arisen if the creditors who had executed had been

excluded from their remedies against third persons, is relieved by the 228th section.

They referred to *Garland v. Carlisle*; (a) *Dutton v. Morrison*; (b) *Simpson v. Sikes*; (c) *Botcherby v. Lancaster*; (d) * 890 Bacon's Abridgment, "Covenant," G.; * Comyn's Digest, "Covenant," F.; *Fawcett v. Gee*; (e) *Smith v. Hurst*; (g) *Parker v. Ramsbottom*; (h) *Solly v. Forbes*; (i) *Davidson v. McGregor*; (k) *Bain v. Cooper*; (l) *Cooling v. Noyes*; (m) *Todd v. Reid*; (n) *Smith v. Winter*; (o) *Mayhew v. Crickett*; (p) *Tyson v. Cox*; (q) *Wyke v. Rogers*; (r) *Samuel v. Howarth*; (s) *Clark v. Devlin*. (t)

Mr. Daniell and *Mr. Aspland*, for the assignees. — The deed contained an absolute release, and it was executed by a partner in each of the appellants' firms, and was afterwards acceded to and acted upon by the appellants. It therefore absolutely discharged the debts for which the father was surety to them. Although it should be admitted that on the deed being avoided by the bankruptcy the liability of the principal creditor revived, it does not follow that the liability of the surety would be revived also. The contrary is the law, since a surety once discharged by the act of the creditor cannot be again made liable. With regard to the argument founded on the arrangement clauses, those provisions cannot apply to a deed not signed so as to fall within them.

They referred to *Newnham v. Stevenson*, (u) *Bellingham v. Freer*, (v) *Harrhy v. Wall*, (w) *Graham v. Ackroyd*, (x) *Bain v. Cooper*, (y) *Bailey v. Haines*, (z) *Clayton v. Kynaston*, (aa)

(a) 4 Bing. N. C. 7; 2 Moo. & S. 24; 10 Bing. 452; 3 M. & W. 152.

(b) 17 Ves. 193.

(c) 6 Mau. & S. 295.

(d) 1 A. & E. 77.

(e) 3 Anst. 910.

(g) 10 Hare, 30.

(h) 3 B. & C. 257.

(i) 2 Bro. & B. 38.

(k) 8 M. & W. 755.

(l) 9 M. & W. 701.

(m) 6 T. R. 263.

(n) 4 B. & A. 210.

(o) 4 M. & W. 454.

(p) 2 Swanst. 185.

(q) T. & R. 395.

(r) 1 De G., M. & G. 408.

(s) 3 Mer. 272.

(t) 3 Bos. & Pul. 363.

(u) 10 C. B. 713.

(v) 1 E. F. Moore, 333.

(w) 1 B. & A. 103.

(x) 10 Hare, 192.

(y) 9 M. & W. 701.

(z) 15 Q. B. 533.

(aa) 2 Salk. 574.

Nicholson v. Revill, (a) *Ford* * *v. Beech*, (b) *Cockshott* * 891
v. Bennett, (c) *Ex parte Glendinning*, (d) *Coleman v.*
Waller, (e) *Cullingworth v. Loyd*, (g) *Wyke v. Rogers*, (h)
Owen v. Homan, (i) *Espey v. Lake*, (k) *King v. Hoare*, (l)
Lewis v. Jones, (m) *Cocks v. Nash*, (n) *Evans v. Elliot*, (o)
Pendlebury v. Walker. (p)

Judgment was reserved on both appeals.

February 28.

THE LORD JUSTICE KNIGHT BRUCE. — These petitions (which, like many others, though in the form of appeal, are supported and opposed by testimony that was not, as well as testimony that was, before the learned commissioner in the bankruptcy), call for our decision upon disputes of fact more distressing, whether more or less difficult, than the questions of law and equity raised by them, — disputes that have required a careful examination of evidence, unfortunately including upon one side or the other, if not on both, some very seriously incorrect swearing.

Having considered the materials before us as much and as long as could be useful, we have now to terminate, so far as we can terminate, this crabbed litigation.

And first, with regard to the bankers' petition, of which I shall dispose, so far as I am concerned, wholly and separately, before again touching upon the other. The object of these petitioners, who carry on their business * of bankers at Nor- * 892
wich, is to establish, that, upon a promissory note, a joint ●
and several note for 3030*l.*, dated the 14th December, 1852, payable on demand, which, for valuable consideration, Mr. Edward Blakely, also of Norwich, the bankrupt in this bankruptcy, and his son, Mr. Edward Theobald Blakely, then signed and gave to them, they are entitled to prove against the estate of the former a debt

(a) 4 A. & E. 675; and see *Kearsley v. Cole*, 16 M. & W. 136.

(b) 11 Q. B. 852; and see *Webb v. Spicer*, 13 Q. B. 898.

(c) 2 T. R. 763.

(k) 10 Hare, 260.

(d) Buck. 517.

(l) 13 M. & W. 494.

(e) 3 Y. & J. 212.

(m) 4 B. & C. 506.

(g) 2 Beav. 385.

(n) 9 Bing. 341.

(h) 1 De G., M. & G. 408.

(o) 9 A. & E. 342.

(i) 3 Mac. & G. 378.

(p) 4 Y. & C. 424.

of 2857*l.* 7*s.* 5*d.* There is no contest as to the amount, for it is admitted that the petitioners, if entitled to prove at all upon the note against the elder Mr. Blakely's estate, are entitled to do so for that sum. Their right is denied by the assignees on the single ground of the execution by one of the petitioners, namely, Mr. Harvey, of a deed of trust for the benefit of the creditors of the younger Mr. Blakely, which deed, dated the 29th March, 1853, was executed by him probably on that day, but certainly on that or the preceding or following day, and by Mr. Harvey, I believe, on the 7th April following.

The assignees insisted before the learned commissioner, and still insist, that by the deed Mr. Harvey released and discharged the younger Mr. Blakely, and, by doing so, released and discharged his father, though not a party to the instrument nor purporting to be released or discharged by it from the note.

The learned commissioner, thinking the assignees right in the contention, rejected the proof tendered by the petitioners for the 2857*l.* 7*s.* 5*d.*, which they consequently now ask us to admit.

It may be right to notice that the 11th April, 1853, was the day on which Mr. Blakely the elder was adjudicated a bankrupt; that he was so upon an act of bankruptcy committed by him
 * 893 three days, and only * three days, before; and that, his son having been adjudicated a bankrupt within less than a month, but not less than a fortnight afterwards, both bankrupts have obtained their certificates.

The act of bankruptcy on which the adjudication against the son proceeded was his execution of the deed already mentioned, and that adjudication having never been annulled, or, as I believe, sought to be annulled or interfered with, and his bankruptcy and certificate under it being in full force, I think it unnecessary to give any opinion upon the controversy whether his petitioning creditor was a person entitled to treat the deed as an act of bankruptcy.

A main point, though perhaps not the only point, made by the respondents against the proof, has been that, as they allege, the elder Mr. Blakely joined in the note of December, 1852, as surety, and merely as surety, for his son. This point, however, is immaterial, if, before the father committed on the 8th of April the act of bankruptcy upon which he was adjudicated a bankrupt, he knew or had notice of the existence and approved of the deed of the

29th of March, and had, before or after Mr. Harvey's execution of it, assented to Mr. Harvey's concurrence in it. Ought it then, or ought it not, to be judicially believed that before the elder Mr. Blakely's act of bankruptcy of the 8th of April he knew or had notice of the existence and approved of the deed of the 29th of March, and assented before or after Mr. Harvey's execution of it to Mr. Harvey's concurrence in it? The petitioners affirm and the respondents deny this proposition, and there is a conflict of evidence upon it. But the proposition is one probable in its nature,—one that if the only allegations of fact before us were those of which the truth is admitted, or so clearly and manifestly * proved as to be substantially not contested, * 894 would properly, I think, be inferred to be true also, and one lastly which, upon a just estimate of the whole of the actual materials before the Court, ought, I conceive, to be judicially considered and decided to be true.

Next it is to be recollected that the arrangement, the transaction of which the deed was part, or which it was to declare and effectuate, has never been completed, but fell to the ground and wholly failed of effect. The deed was not executed by Mr. Harvey before the 7th of April last. Within less than a month afterwards came the adjudication against the younger Mr. Blakely, proceeding, as I have said, on his execution of it. The deed, subject to this observation, that the three trustees, who were, I believe, in fact, respectively creditors (though Mr. Harvey only so as a member of his firm), did in one if not in both of those characters execute it, was not executed by any creditor. Nor does it in the body of it, or in a schedule, or in any way mention or show the name of any other creditor than the three trustees, or the nature or amount of any debt due to them or to any creditor whomsoever. Not a creditor has received, and it must be taken that no creditor ever can receive, a dividend under it, for the bankruptcy founded, and I must suppose well and duly founded, on it rendered it void against the assignees, under that bankruptcy, who have taken accordingly all the property that the deed was intended or professed to pass.

There is not, I think, the least reason to believe that Mr. Harvey executed—and the just inference from the evidence I conceive to be that he did not execute—it with any view or intention of releasing or discharging Mr. Blakely the elder in respect of the promissory note of the preceding * December, and I am * 895

persuaded that not any party to the deed did, before executing or when executing it, suppose or believe that the effect of Mr. Harvey's execution of it was or would be so to release or discharge Mr. Blakely the elder. There can be no doubt that it might have been so framed as (all things else being the same) to protect the son from being sued by the petitioners as his creditors, and at the same time to render it certain and manifest that the father could not, on the ground of Mr. Harvey's execution of it, claim successfully to be or have been so released or discharged; and I am convinced that had the attention of Mr. Harvey been called to the point, he would have refused to execute the instrument unless so altered.

The question then arises whether his execution of the deed, as it stands, did release or discharge Mr. Blakely, the father, at law, as to the promissory note of December. If not, the deed certainly had in equity no such effect. But if the release or discharge was effected by the deed at law, still, in my judgment, under the circumstances, it was not so in equity. That is, it appears to me that, in equity (by re-forming the deed, or without that step), the petitioners were, perhaps before, but certainly after the adjudication against the son, entitled to be relieved against that legal effect, and, subject to the operation of the father's bankruptcy, restored to their right of action against him; nor has any thing taken place which can have precluded them from asserting that equity,—an equity as effectual against the assignees as against their bankrupt.

We are bound, I think, accordingly to declare that the petitioners have the same right of proof against the estate of Mr. Blakely, the father, under his bankruptcy, as they would have had if * 896 Mr. Harvey had neither executed * nor been aware of the deed of the 29th of March, 1853, and to admit, therefore, the 2857*l.* 7*s.* 5*d.* to be proved.

The petitioners have appeared here by four learned counsel, and have made an unsustained charge of concealment of property against the younger Mr. Blakely, but, subject to deductions in those respects, ought, I think, to have their costs of this petition from the estate. My reasons are, not only that the struggle against the proof into which the assignees have entered had no warrant from good sense or abstract justice, but that, moreover, the proposition of their duty having required from them that struggle is one not established to my satisfaction. That the equity of this case, not merely in the judicial, but also in every other sense of that

expression, is with the petitioners, and that although the controversy has come before us not exactly as it was before the learned commissioner, I consider the failure of the opposition to the proof too complete on technical, equally, and rational grounds to justify us in rendering the success of these just creditors merely or nearly barren.

And now to take up the petition of Messrs. Springfield and Robinson. Upon this, besides the evidence strictly belonging to itself, the affidavits belonging to that of the bankers have been by agreement between the parties made evidence so far as those affidavits bear on the questions common to both petitioners; and after the statement that I have made of the reasons and grounds of the decision which, so far as I am concerned, I have just pronounced in favour of Messrs. Harvey & Co., — a statement to a considerable extent, if not altogether, applicable here also, — I cannot deem it necessary for me to say much more.

* It is, in my opinion, established that Mr. Thomas Os- * 897 borne Springfield's execution of the deed of the 29th of March, which must be understood to have taken place on the day of its date, took place with the privity and previous and contemporaneous approbation and consent of the elder Mr. Blakely, and without any intention, notion, suspicion, or idea on the part of Mr. Thomas Osborne Springfield that his execution of it should or would defeat or prejudice any claim of his firm upon the elder Mr. Blakely. I believe that if any such notion, suspicion, or idea had been entertained by Mr. Thomas Osborne Springfield, he would have refused to execute, and that he did not deceive or mislead or wrong any person by executing the deed, which, having produced nothing, and become incapable of producing any thing except the bankruptcy of Mr. Edward Theobald Blakely, but having, as his deed, been rendered absolutely ineffectual as from the beginning in every sense here material, cannot, in my judgment, be set up against these petitioners by the respondents. The same order, *mutatis mutandis*, as in the preceding case, ought, I conceive, to be made in this.

I need scarcely add that I think it not material whether the elder Mr. Blakely ought to be considered as a surety or a principal with regard to the bills or debt here in question, or whether the 228th section of the Bankrupt Act has any bearing on the dispute.

THE LORD JUSTICE TURNER. — The case of the assignees upon these petitions cannot be more favourably stated than that the bankrupt, Edward Blakely, was a surety merely, and that the petitioners, Robert John Harvey Harvey and Thomas Osborne
 * 898 Springfield, executed the deed of the 29th of * March, 1853, as creditors, and not merely as trustees; and it is upon this footing, and without reference to the question whether the bankrupt, Edward Blakely, ought to be considered to have stood in the position of principal and not of surety, or to the question, whether the above-named petitioners ought to be considered to have executed the deed as trustees merely, and not as creditors, that I intend to deal with these petitions. Dealing with them upon this footing, the sole question which, in my opinion, it is necessary for us to decide is, whether the bankrupt, Edward Blakely, concurred in the execution of the deed in question by the petitioners, Robert John Harvey Harvey and Thomas Osborne Springfield, or ratified their execution of that deed at any time before the 8th of April, 1853, when he became bankrupt. If such concurrence or ratification on his part be established by the evidence before us, no serious difficulty will, I think, be found to exist upon the application of the law to the fact.

This question of fact depends in substance, as to both petitions, upon the affidavits of Robert John Harvey Harvey, Thomas Osborne Springfield, and Palmer, on the one side, and of the bankrupt, Edward Blakely, and his son, Edward Theobald Blakely, on the other; but it will be convenient to consider the question separately upon the two petitions, and to deal with it first with reference to the banker's petition.

[After commenting on a portion of the evidence in detail, his Lordship said:] If the case rested upon these affidavits only, I should feel judicially bound to conclude that the bankrupt was privy to and concurring in the execution of this deed by the petitioner, Robert John Harvey Harvey. Taking into account the confirmation given to the statements of Harvey by the
 * 899 * evidence of Springfield and Palmer, this conclusion appears to me to be quite irresistible.

The case therefore, in this view of it, would stand thus: That the bankrupt applied to Harvey to take 10s. in the pound, which, so far as Harvey was aware, could only be got under the deed of the 29th of March, he, the bankrupt, knowing, at the time, of the

arrangement of the 7th of April, and not communicating it to Harvey. A more direct attempt on the part of a surety to draw in a creditor to execute a deed, and afterwards to set it up in his own discharge, could hardly, I think, be conceived.

The same observations which apply to the petition of the bankers apply also to the petition of Springfield. The evidence which in the one case establishes privity, in the other establishes ratification.

It remains, then, only to apply the law to the facts of this case. The general rule, that a surety who has concurred in or ratified an arrangement between the creditor and the principal debtor cannot claim to be discharged by the effect of that arrangement, was not disputed in argument; but it was said that the bankrupt, considering him to be surety merely, must, in this case, be held to be discharged, the deed executed by the petitioners, Harvey and Springfield, being a deed of composition with the creditors of the principal debtor, and there being no reservation upon the face of it of the right to proceed against the bankrupt, the surety. Great reliance was placed in the argument upon the circumstance of no such reservation being contained in this deed; but I am not prepared to say that such a reservation on the face of the deed is in all cases necessary. I am disposed to think (although I
* do not deem it necessary and do not intend to give any * 900
final opinion upon the point) that it is in some cases necessary and in others not; but, whether necessary or not, I do not think that the absence of it is of itself sufficient, in all cases, to destroy any independent equity which may exist between the parties. This is not a case in which other creditors have executed the deed after the execution of it by Harvey and Springfield. It is not a case in which the deed is of any force or validity. It is a case in which the creditors whose debts are disputed have executed the deed at the instance of the surety, and as to one of them, at least, upon his promise that the balance of the debt should be paid by him; and under such circumstances I do not think that he or his assignees can be permitted in equity (whatever might be the rights at law) to insist on being discharged from the debt by virtue of the deed. This case differs in its circumstances from *Lee v. Lockhart*, (a) but what fell from Lord COTTENHAM in that case appears to me to bear very strongly upon the question.

(a) 3 Myl. & Cr. 302.

In my opinion, therefore, these proofs must be admitted, and, with the qualification which my learned brother has suggested, I think all the costs must come out of the bankrupts' estate.

* 901 * *Ex parte* ARTHUR CHARLES EMERY.

In the Matter of JOHN BRADBURY.

1854. March 10. Before the LORDS JUSTICES.

Where the time had elapsed during which the bankrupt would have been at liberty to dispute the adjudication, a petition to annul, presented by a creditor at the bankrupt's instigation, was dismissed with costs.

Quære, whether holding shares in a mine carried on under a license to get ores at a royalty determined by the quantity got and sold, is a trading within the bankrupt law.

THIS was the appeal of the petitioning creditor from an order annulling the adjudication, at the instance of a creditor, for want of a sufficient trading.

The adjudication took place on the 12th of August, 1853, and the trading relied upon was the holding of shares in a mining company, which carried on its business under a license granted by an indenture made the 13th of September, 1853, between certain persons thereafter denominated "grantors" of the one part, and the grantees who, and the survivor and survivors of them, their and his executors, administrators, co-adventurers, and assigns were thereafter denominated "miners," of the other part.

By this deed the grantors granted unto the miners full and free liberty, power, and authority to dig, work, mine, and work for tin, copper, lead, and all other metals, ores, and metallic minerals and limestone within, under, and throughout all those fields, or closes of land, being parts and parcels of the estate of Mixon, situate in the parish of Leek, in the county of Stafford, delineated in a map or plan indorsed on the deed; and all ores, metals, and metallic minerals there gotten to raise and bring to grass, and there to dress, cleanse, and make fit for sale, and, subject to the reservations herein contained, to carry away and convert the same

to their own use ; and also free liberty to erect any engines, sheds, cottages, and buildings, and to conduct, * divert, * 902 and use any water or watercourses, and to make any adit or adits, drifts, shafts, pits, and leats, and do all other reasonable acts necessary in the ordinary course of mining, for the purpose of discovering, raising, and making fit for sale the said metals, ores, and metallic minerals: except and always reserved out of the grant unto John Sneyd, the proprietor of the set thereby granted, and lands adjoining thereto, and to his heirs, grantees, and assigns, and his and their agents, servants, and others to be employed or authorized by him or them, full and free liberty, power, and authority at any time or times to make and drive any new adit or drift, adits or drifts, from any adit or adits, drift or drifts, shaft or shafts, driven or sunk, or thereafter to be driven or sunk, within the limits aforesaid, and to sink any shaft or shafts therein, and to keep open, repair, and use the same, with full power to turn the water which should arise or occur in such new adit or shaft, or adits or shafts, into all or any of the adits, drifts, or shafts then or thereafter to be made by virtue of the now stating indenture, and to quietly and peaceably enter into and drive such new adit or adits in and through the limits of the lands aforesaid, or any part thereof ; and to sink any shaft or shafts therein, and to convey any waters or watercourses into and over the lands and grounds, or any part thereof, in such manner as he or they should think proper, and to make any leat or leats whatsoever for that purpose ; and to erect and support any buildings; leats, flat-rods, or other machinery whatsoever upon any of the said lands or grounds for the driving of such adit or adits, or conveying any water or watercourses into and over any other lands of the said John Sneyd, his heirs or assigns, or into the lands of any other person or persons whomsoever, or for any other purpose whatsoever, at his and their respective will and pleasure, doing thereby no wilful * hurt or injury: to have, hold, use, exer- * 903 cise, and enjoy the said liberties, licenses, powers, and authorities thereby granted unto the said miners for and during the term of twenty-five years, to be computed from the 29th of September then last (except the last two days of the term) ; they, the said miners, yielding and paying therefor unto the grantors, as by way of rent, for and during the first two years of the term one-twentieth, and during the remainder of the term one-sixteenth part of the

amount of gross moneys (whether in fact such moneys should be received or not) for which all tin, copper, lead, and all other ores, metals, and metallic mineral and limestone to be raised or gotten should be sold or contracted to be sold: all the said ores, metallic minerals, and limestone having been first well and duly spalled, dressed, sampled, and made merchantable and fit for sale at the expense of the miners; and all and every such payments to be made at the expiration of three calendar months after every such sale or contract for sale as aforesaid, clear from all deductions whatsoever, except the present or any future property or income tax to become payable in respect of the said dues or rent: and also except such charges as should be from time to time incurred in the transport of the said ores, minerals, and limestone to a convenient place of sale, and the expense of sampling and sample fees.

The adjudication having been advertised in the London Gazette, the bankrupt, on the 29th of August, 1853, applied for and obtained an allowance of 1*l.* per week to be paid to him out of his estate and effects, for the support of himself and wife, and on the same day he obtained protection.

The bankrupt, on being examined before the commissioner on the 17th of November, 1853, admitted * that he had been in the habit of betting at steeple-chases, and had also lost 20*l.* in one day in one bet upon the Derby in May, 1853.

On the 17th of December, 1853, the respondent, Mrs. Susannah Allcock, who was the bankrupt's sister-in-law, and claimed to be a creditor and a mortgagee under a bill of sale, presented a petition to the district Court to have the adjudication annulled for want of trading. This petition came on to be heard on the 24th of January, 1854, before Mr. Commissioner DANIELL, who took time to consider his judgment until the 24th of February, 1854, when he ordered the adjudication to be annulled at the cost of the petitioning creditor. (a)

(a) The following was the substance of the judgment delivered by the learned commissioner: —

In this case a petition has been presented by a creditor claiming a security upon a portion of the bankrupt's estate to annul the adjudication on the grounds of the insufficiency of the petitioning creditor's debt, and of the bankrupt not having been a trader within the meaning of the bankrupt law. A preliminary objection was taken, before the case was opened, to the power of this Court to entertain the application; but this point has been expressly determined by the Lords Justices in *Ex parte Bean* (1 De G., M. & G. 486).

* The petitioning creditor now appealed from the commis- * 905
sioner's decision.

The distinction between an application to annul an adjudication by a creditor, and one by the bankrupt himself, has been clearly established by the decision of Lord TRURO in *Ex parte Carter* (1 De G., M. & G. 212), which was affirmed by the House of Lords (4 H. of L. Cas. 337). After this decision, it is impossible to entertain a doubt that although in the case of a bankrupt seeking to annul an adjudication after the seven days named in the 104th section of the Bankrupt Law Consolidation Act, he must in the first instance apply to the Lords Justices, yet, in the case of a creditor complaining of an adjudication, he must in the first instance apply to the Court of Bankruptcy.

But it has been contended, on the authority of *Ex parte Maxwell* (3 M. D. & D. 708), that the petitioner is out of time in the presentation of her petition. In that case the then Chief Judge of the Court of Bankruptcy (the present Lord Justice KNIGHT BRUCE) refused to entertain a petition to annul the adjudication at the instance of a creditor on the ground of the length of time which had elapsed. There, however, more than two years had passed since the *fiat* was sued out, many creditors had proved, and the assignees had sold some real and leasehold property under it. In the present case, the petition for adjudication was filed so recently as the 7th of August, and no creditor, except the petitioning creditor, has yet proved his debt, and the bankrupt has not even passed his last examination; besides which the present petitioner, as far as I can ascertain, instead of being guilty of laches, has used all due diligence to submit her right to a legal decision.

She appears to have taken an early step to decide this point by bringing an action against the assignees to recover the value of the property comprised in her security which they have sold.

The assignees took out summonses to compel the attendance of the petitioner to be examined, which she was unable to obey in consequence of ill health, and the result was a proposal to leave the whole dispute to my decision. The 7th of December was fixed for the hearing of the case. It appears, however, that some dispute arose between the solicitors as to the terms of the reference, and it was abandoned. The present petition was filed on the very day on which the case was to have been argued before me. She has since discontinued her action. I cannot think that the petitioner can, under the circumstances, be considered as having been guilty of any improper delay.

This brings me to the consideration of the points raised by the present petition; and these are, first, the insufficiency of the petitioning creditor's debt, and, secondly, the trading. Before I proceed to them, however, I think it right to notice another point which has been raised in the course of this discussion, namely, the complicity (if I may be allowed the expression) of the bankrupt with the petitioner in the presentation of this petition. Mr. Emery, the petitioning creditor, has taken upon himself to swear, in one of his affidavits filed in this case, that he verily believes that this application is made at the instigation of the bankrupt for the purpose of relieving him from the effects of his evidence as to gambling. For this belief his only foundation is that Mrs. Allcock is a sister-in-law of the bankrupt, and it has been contended that because Mrs. Allcock

* 906 * In support of the petition of appeal the appellant deposed that he had been informed, and verily believed,

has not thought proper to file an affidavit to contradict this imputation, I must take it for granted that it is true. But I am not bound to draw any such inference from an allegation so loosely made. It is true that the bankrupt is most materially interested in the result of this application, supposing the adjudication to be good, since an admission that he has made in his examination before with regard to gambling would clearly operate to prevent his ever obtaining a certificate under this adjudication. It is therefore most important to him to get rid of it, and he is, I think, perfectly justified in giving the petitioner every support in his power. He has allowed the opportunity of appealing against the adjudication himself to escape him, and I can very well imagine that he has done so from an impression that the adjudication was right, and that there was no use in exhausting his resources (whatever they are) in disputing it himself. The question, however, whether a person circumstanced as he was can be considered as a trader within the meaning of the bankrupt law has never yet, as I am aware, been specifically determined. Mrs. Allcock has quite sufficient grounds for filing this petition without the instigation of the bankrupt.

[After discussing the question of the validity of Mrs. Allcock's claim, and overruling the objections made to the petitioning creditor's debt, the learned commissioner said, —]

We now come to the consideration of the other question, namely, the trading. The bankrupt is described in the petition for adjudication as a dealer in copper ores, dealer and chapman. In the deposition upon which the adjudication is founded, it is simply stated that he exercised the business of a dealer in copper ores, by buying and selling copper ores, and sought and endeavoured to get his livelihood thereby as others of the same trade usually do. In fact, the only evidence of trading which has been produced shows merely that the bankrupt, at the time when he contracted his debt with Mr. Emery, was a shareholder in certain mining companies; and the question, whether he is to be considered a trader within the meaning of the law in force concerning bankrupts, depends upon the question whether persons working mines under the circumstances in which these companies are placed, can be considered as traders, and that is the question now for my consideration. There is little, if any, difficulty with regard to facts. It appears from the evidence, that at the time when this bankrupt contracted the debt due to Mr. Emery, he was a shareholder in at least two trading associations established for the purpose of working mines in England, — one called the Chiprace Mining Company, established for the purpose of working a tin mine in Cornwall, and the other the Mixon Great Mining Company, established for the purpose of working a copper mine in the county of Stafford. He was also interested in a foreign mining company called the Anglo-Californian Mining Company. The question as resulting from the bankrupt's connection with the Mixon Mining Company has been most discussed. I shall therefore address myself in the first instance to that part of the case. It appears from the affidavits and examinations that the Mixon Company (which is nothing more than an ordinary association or partnership established for the purpose of working the mine) was formed in the month of September, 1852, for the purpose of taking

* that the respondent was at the House of the bankrupt, * 907 and knew of the adjudication against him on the 13th

the mine in question, and of working the same on what is called the cost-book principle. It appears that this company was originally formed with a view of taking an underlease from certain persons who are the original lessees of it, and who had entered into an agreement with three of the adventurers in the present company for the grant to them of an underlease. The underlease was not completed till the 13th of September last (after the bankruptcy). By that lease, which bears date the 13th of September, 1853, Messrs. Stephens, Pobley, and Hambly grant, — [The commissioner read the material parts of the lease.]

It appears by the evidence of Mr. Badger, who was examined here, that in the month of March, April, and May, mining operations were being carried on by the company, at all events sufficient to raise the question whether these operations are trading operations so as to constitute a holder of shares in the company a trader within the bankrupt law. As far as I can collect from the cases which have been determined bearing upon that point, the rule of law is, that when a person is the owner of the soil, whether as a freeholder or as a lessee, and for the purpose of making the most of his property, digs or works up the produce of the soil, and sells it again, he will not be liable to the bankrupt laws. It is not necessary to go into the cases on the subject; they are referred to and commented upon by Lord ELDON in *Ex parte Gallimore* (2 Ro. 424). Of course the rule is the same whether the owner of the soil is an individual or a partnership company of several. This rule has been held to apply to coal mines and to stone quarries which are in the nature of mines, and there can be no doubt that it will apply to all other mines; such as copper and tin mines, where the parties working the mines and selling the ores are owners of the soil from which the materials are produced. It has been objected, however, in this case that the partnership of adventurers called "The Mixon Mining Company" are not, under the terms of the lease upon which the mine is held, the owners of the property either as a freeholder or as lessees, but are merely the holders of a license from the owner of the soil to dig and get the ores and minerals of which they are to account for a certain proportion to the owner in the way of rent; and the case *Ex parte Harrison* (1 Bro. C. C. 173) has been relied upon as supporting this argument; but in that case the bankrupt had been a trespasser, and had no interest in the land. The case of *Parker v. Wells* (Cooke, B. L. 52, 1 T. R. 34), which has also been referred to, is one of a similar nature. In that case the bankrupt appears to have had no interest in the land, although he lived with his father upon it; the father was the lessee, and suffered the bankrupt to buy clay for the purpose of making bricks and tiles for sale, with the view of deriving a profit therefrom; but the father had the sole beneficial enjoyment of the farm. It appears, however, from the statements of Mr. Cooke, in his able work on the Bankrupt Laws, that the parties had been prevented from obtaining the final decision of the House of Lords upon the question. A special verdict was found, and the case was to have been taken before the House of Lords, but it was discovered that the bankrupt had left off brick-making before the petitioning creditor's debt accrued. The whole inference therefore to be drawn from *Ex parte Harrison* and *Parker v.*

* 908 * of August, and that on the 17th of August the deponent was served with a notice, signed by Mrs. Allcock's solicitors, which was as follows: —

Wells is, that when a person having no interest in the land works up the materials for the purpose of sale for his own use, by the license or consent of the owner, he will be considered as a trader within the bankrupt laws; and this does not at all interfere with the principle laid down in other cases, that where a person who is the owner of the soil merely makes a profit of it, he will not be a trader. This is equally applicable to mines as to the manufacture of bricks; indeed, it has been held to apply to coal mines and to stone quarries, which are in the nature of mines. It has been said, however, that Mr. Baron PARKE, in the case of *Meadwin v. Brown* (9 Law Jour. N. S., Exch. 289), has expressed a different opinion on the subject of mines. He is there reported to have said that a mine is a trading concern, from which I am required to draw the conclusion that all persons engaged in mines are traders within the bankrupt laws; and certainly if that opinion had been expressed by so learned and able Judge as Mr. Baron PARKE in a case where the question was before him for decision, I should have felt myself bound to abide by it; but the passage quoted was a mere dictum, expressed in a case which had nothing to do with the point now before me. The question then before the Court of Exchequer was, whether a mining partnership was similar to an ordinary trading partnership, so as to authorize the partners to bind each other. The learned Judge never meant to lay down the broad rule that for all purposes a mine must be considered as a trading concern, whether the adventurers are owners of the soil or not, which is the point under consideration. But then it has been urged that the cases all go to show that to exclude the operation of the bankrupt laws, the persons working a mine for profit must be the owners of the land, either as freeholders or leaseholders; and it is contended that, by the nature of the lease which has been referred to, as showing the interest the adventurers take in the mine, they had no interest in the soil, and in fact have merely a license from the owner to get and dig the ores and minerals, for which they are to pay a certain stipulated annual rent, to be estimated according to the value of the ores and minerals raised from the mines. *Ex parte Harrison* has also been relied upon to show that persons manufacturing the produce of land under a license from the owner are traders subject to the bankrupt laws. I have, however, already observed that all the inference that can be drawn from *Ex parte Harrison* or from *Parker v. Wells* is, that a person working the produce of land in which he has no interest would be a trader. It is true that in *Ex parte Harrison* the word license is used by the Lord Chancellor, but I apprehend that it is not used in the sense in which it is now attempted to be applied. I take it that by the word license, in that case, the Lord Chancellor meant merely permission, and that what he laid down amounts to no more than this, namely, that the bankrupt, not having any interest in the land, dug the material out of the earth, which his Lordship considered amounted to the same as if the bankrupt had obtained them, not in his own right (having no interest in the soil), but by permission. It is clear that the bankrupt there had no interest in the property whatever, but that having

“ Mr. Thomas Bittleston, Mr. William Bodill, and all others whom it may concern.

“ You are hereby required to take notice, that by an *indenture, dated the 2d day of July last, and made * 909 between John Bradbury and Lydia Nicholls his wife, * of the one part, and Susannah Allcock, of Birmingham, * 910 widow, of the other part, all and singular the household goods, furniture, and effects, then being in and upon the dwelling-

afterwards paid a compensation to the lord he was considered to have had a license from the lord, and to have purchased the earth from him. Can this be said to be the case here? Have the adventurers no interest in the mine out of which the ore is dug? It is true that the lease under which the mine is held is in the form of a license to dig for ores and minerals under the land specified, and does not contain any demise of the land, and therefore cannot be said to give any interest in the surface, but the interest which the miners take is a permanent interest, and an exclusive one for the term to which it extends. The getting and carrying ore or minerals from land cannot be considered as the workmanship of goods and commodities, as was the case of brick-making. Neither can persons raising ores from mines for the purpose of sale be considered as persons using the trade of merchandise by way of bargaining, exchanging, bartering, commission, or consignment in gross or in detail. The only way in which parties engaged in the business of mining can be brought within the operation of the statute would be by showing that they seek their living by buying and selling. Now, in this case (with the exception of a small quantity of ore upon the bank which the company took from the former miners before they could get possession of the mines), there does not appear to be an instance in which the company has purchased a single ounce of ore, unless it can be said that the payment of the rent to the grantors under the reservation can be considered as a buying within the meaning of the statute. It does not appear to me that it would be a very sound construction of the Act to say that the payment of rent for the right of getting ore from the soil, can be considered in the light of buying the ore from the owner of the soil, and it is one which I do not certainly feel myself justified in putting upon it. On the whole, I am of opinion that Mr. Bradbury is not a trader, and that the adjudication must be annulled.

With regard to the question of costs, if the petitioner had tried this question at law and succeeded upon the ground upon which I now decide, she could have recovered her costs, and I think she ought not to be placed in a worse position because she has abandoned her action, and resorted to this Court for the determination of her right. Had Mr. Emery been merely an assignee chosen by creditors, I might have had some difficulty in ordering the costs to be paid by a person taking upon himself the duty of assignee; but here Mr. Emery is not only assignee, and that entirely by his own election, but he is also the petitioning creditor. My order is, that the adjudication must be annulled, and that Mr. Emery do pay the petitioner the costs of this application, to be taxed by the proper officer of this Court.

house at Balsall Heath, where the said John Bradbury resided, were assigned unto the said Susannah Allcock : and you are hereby requested to withdraw from possession of the said goods and * 911 chattels, and are * hereby informed that unless you do so proceedings will be commenced against you. Dated this 17th day of August, 1853."

The appellant further deposed that the respondent never in any way, as he believed, interfered, until the 7th December, 1854, although she had due notice of the adjudication ; that there was then an action pending between her and the assignees in relation to her claim in which the title of the assignees might be tried ; that she was a sister of the bankrupt's wife, and that the deponent verily believed the present application to be made at the instigation of the bankrupt, and for the purpose of relieving him from the effect of his examination as to gambling.

The appellant also deposed that the respondent had been summoned on two or three occasions for the purpose of being examined as a witness, but had on each occasion avoided the intended examination by sending a certificate of illness.

An affidavit was made by the respondent by way of rejoinder, but was withdrawn.

Mr. Swanston and *Mr. De Gex*, for the appellant. — First, there is a sufficient trading. There is no doubt as to selling : the only question is, whether there was a buying. That depends on the nature of the interest which a grantee takes under such a license as this. He does not purchase any part of the soil in an unconverted state. He has a mere easement in it, a right to search for ore and to sever it ; but the payment is only made for and with express reference to the severed ore. The incorporeal right of entering and searching for the ore is merely subservient and incidental to the purchase of it when severed. This was the

* 912 view taken by Lord TENTERDEN * in *Doe v. Wood*. (a) His Lordship there said : " The usual technical words of demising such matters are well known and usually adopted in a formal deed, where the intent is to demise the land, or metals or minerals ; but the purport of the granting part of this indenture is to grant, for the term therein mentioned, a liberty, license, power, and author-

(a) 2 B. & A. 738.

ity to dig, work, mine, and search for metals and minerals, in and throughout the lands therein described, and to dispose of the ore, metals, and minerals only that should within that term be there found, to the use of the grantee, his partners, &c.; and it gives also further powers for the more effectual exercise of the main liberty granted. Instead, therefore, of parting with or granting or demising all the several ores, metals or minerals, that were then existing within the land, its words import a grant of such parts thereof only as should, upon the license and power given to search and get, be found within the described limits, which is nothing more than the grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals or minerals, ungot therein; but he had a right of property only as to such part thereof, or upon the liberties granted to him, should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land; and is such a right only as, under the circumstances stated in this case, is not sufficient to support the present action of *ejectment. This, we think, is the effect and operation of * 913 the deed, considering it with reference to its granting part only; and we are fortified in this opinion by the construction given to similar words of grant in *Lord Mountjoy's Case* (a) and in *Chetham v. Williamson*; (b) even if the liberty granted be to be considered a liberty to get, exclusive of the grantor; and *a fortiori*, if it be, as in those cases, to be considered as not exclusive; that, however, is a point which it is unnecessary for us now to decide." *Warwick v. Bruce*, (c) *Parker v. Staniland*, (d) are also authorities which support the appellant's case; and the language of Lord ELDON in *Norway v. Rowe* (e) shows strongly

(a) Godb. 17; 1 And. 307; and 4 Leo. 147.

(b) 4 East, 469.

(d) 11 East, 362.

(c) 2 Mau. & Sel. 205.

(e) 19 Ves. 159.

that carrying on a mine has all the essential ingredients of trading. Is there, then, any thing in the Act to exclude such buying and selling from being a trading within its meaning? It may be remarked, that the statutory buying and selling is not confined to buying and selling chattels by the terms of the Act.

[The Lord Justice KNIGHT BRUCE referred to the words "goods and commodities."]

Those words belong to the preceding ones, "workmanship of," which were newly introduced into the 6 Geo. 4, c. 16, and could never have been intended to confine the preceding words, which had been without any such addition in all the previous Acts. As there is no language of the Act adverse to our interpretation, so there is no authority, properly considered, which militates against it. *Port v. Turton* (a) is the strongest case which can be cited against us, and is that referred to by some text-books as determining that land jobbing is not trading; but in that case there * 914 was a lease of the coal, and not a mere * license to dig, and the Lord Chief Justice assumes that even a brick-maker who worked the clay on his own soil would be a trader.

They also referred to *Sutton v. Weeley*, (b) *Ex parte Gallimore*, (c) *Heane v. Rogers*, (d) *Ex parte Burgess*, (e) *In re Atkinson*, (g) *Lawton v. Lawton*, (h) *Crawshay v. Maule*, (i) *Jefferys v. Smith*, (k) *Fereday v. Wightwick*, (l) *Tredwen v. Bourne*, (m) *Ex parte Harrison*, (n) *West Middlesex Water-works Company v. Suwerkop*, (o) *Parker v. Wells*. (p)

Next, this is a mere contrivance to get rid of the effect of the bankrupt's express acquiescence in the adjudication, and of the lapse of time which prevents him from questioning its validity.

(a) 2 Wils. 169.

(b) 7 East, 442.

(c) 2 Rose, 234.

(d) 9 B. & C. 577.

(e) 2 G. & J. 183.

(g) 1 M. D. & D. 238.

(h) 3 Atk. 13.

(i) 1 Swanst. 495.

(k) 1 J. & W. 298.

(l) 1 Russ. & Myl. 45.

(m) 6 M. & W. 461.

(n) 1 Bro. C. C. 173.

(o) 4 C. & P. 87.

(p) Cooke, B. L. 52; 1 T. R. 34.

Their Lordships desired the counsel for the respondents to argue first the question as to the petition to annul having been substantially that of the bankrupt.

Mr. Bacon and *Mr. Speed*, for the respondent. — There is nothing to show that the respondent was not making the application on her own account. Her being a connection of the bankrupt's by marriage ought not to exclude her from her rights as a creditor. Indisposition prevented her from attending to be examined.

THE LORD JUSTICE KNIGHT BRUCE. — We do not consider it necessary to give any opinion * upon the question whether * 915 this bankrupt was a trader. Without giving any opinion upon that point we will assume it in the respondent's favour. The adjudication took place in August last, and the bankrupt has so conducted himself as to have become absolutely precluded from questioning it. Whether it be bad or good as against any other person, against him it must always be treated as good. He has so acted as to place himself in that position. If the application to annul had been by him, it is conceded that it must have failed.

But the applicant to annul is a lady of the name of Allcock, who, living with, and being the sister-in-law of, the bankrupt, had a bill of sale of his furniture to secure a real or alleged debt—very probably a true debt—from him to her. The assignees seized and sold these goods, as being in the reputed ownership and within the order and disposition of the bankrupt. Mrs. Allcock brought an action against them for damages for taking the goods, as she was entitled to do, and in which she was entitled to recover if there was no valid bankruptcy. After she had brought the action for the goods, and after the time had elapsed within which the bankrupt could dispute the validity of the adjudication, he, being examined before the commissioner, admitted an act of gambling sufficient to preclude him from having any benefit from a certificate. After this the lady made an application to annul the adjudication. She was living at Birmingham, the site and domicile of the bankruptcy, and there is an affidavit of the petitioning creditor as to his belief that the application was made at the instigation of the bankrupt and for his benefit. That affidavit is sufficient to raise the issue as

to that fact, so far as it is necessary to raise it. The bankrupt, having an opportunity of making an affidavit to deny this, does not do so, nor does Mrs. Allcock. Mrs. Allcock was, perhaps * 916 (as has * been stated), too unwell to be examined; she has, however, made an affidavit upon the present occasion as to one matter, but not as to this. I think, therefore, that the fact must be taken to be established. The bankrupt has had the opportunity of making an affidavit or tendering himself for examination orally. He has done neither. Mrs. Allcock is said to be so liable to be made ill by agitation, that she does not wish to be examined orally. Not only, however, must she be taken to be able to make an affidavit, but she has actually made an affidavit on the present occasion, which her counsel have elected to withdraw. Can we then come to any other conclusion than that this is the petition of the bankrupt in the name of his sister-in-law?

In the exercise of a sound judicial discretion this is a case in which the adjudication must, I think, remain. If Mrs. Allcock can recover at law, we have no intention to interfere; but as far as the present contention is concerned, we think that the adjudication must be replaced. I do not know what the Lord Justice's opinion is as to costs, but in mine they ought to be paid by Mrs. Allcock.

THE LORD JUSTICE TURNER. — From the short experience which I have had of the administration of the bankrupt laws I am satisfied that no proceedings require more careful watching than those in bankruptcy. Here the bankrupt was unquestionably bound by the adjudication, and I think that there would be great danger in permitting any other person to disturb it at his instance. Are, then, these proceedings taken at the instigation of the bankrupt? Now there is a distinct affidavit to this effect, as to the belief of the deponent, and no evidence, on the part of the bankrupt or * 917 Mrs. Allcock, contradicting in the least * degree that allegation. It is said that the facts of the case contradict it. In my opinion the facts tend the other way; for, at first, Mrs. Allcock came in under the bankruptcy, and it was not until the examination of the bankrupt had subjected him to penal consequences that she petitioned to annul the adjudication. It is said also that the only question is between Mrs. Allcock and Mr. Emery; but we must look at their relative interests. She has a right to sue at law; but

how is the petitioning creditor to get payment except under the bankruptcy? It seems to me that all convenience and justice is in favour of maintaining the adjudication. I think that Mrs. Allcock, having made an unfounded application to annul the adjudication, must pay the costs.

THE LORD JUSTICE KNIGHT BRUCE.—Of course Mrs. Allcock cannot be injured by the bankrupt's certificate, since there cannot be any.

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AN INDEX

TO

THE PRINCIPAL MATTERS

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- ANNUITY.

A money-lender agreed to advance a sum at eight per cent per annum, and the premiums on the insurance of the borrower's life. The borrower * executed a bond with sureties, conditioned for payment * 920 of an annuity during his life equal to the above aggregate sums, and any increase in premiums by reason of the grantor being abroad; and the condition also provided for the cesser of the annuity on notice and payment of the original sum advanced, and all arrears of the annuity up to that time, but said nothing as to the policy: *Held*, that, on redemption, the borrower had no equity to have the policy delivered to him. — *Gotlieb v. Cranch*, 440.

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BANKRUPT.

An uncertificated bankrupt carried on business for several years after his bankruptcy with the knowledge of his assignees and of others who were his creditors at the time of the bankruptcy. He died possessed of considerable property. On a claim filed by one of his executors against the other and the official assignee under the bankruptcy: *Held*, that the creditors subsequent to the bankruptcy were entitled to priority over the former creditors, and that the estate ought to be administered in Chancery. The official assignee, who appealed against a decree to that effect, was ordered to pay personally the costs of the appeal. — *Tucker v. Hernaman*, 395.

See PRACTICE, 5.

BANKRUPTCY.

- * 921 1. The commissioner ought to make an order for the sale of property * alleged by the assignees to be in the bankrupt's reputed ownership on their *ex parte* application supported by *prima facie* evidence. — *Ex parte Wood, In re Sutton*, 861.
2. The 17th of the rules and orders in bankruptcy does not render it necessary or proper to serve on a mortgagee notice of an application for an order for the sale of chattels alleged by the assignees to be in the bankrupt's reputed ownership. Such an order should be made on an *ex parte* application of the assignees showing a *prima facie* case. — *Ex parte Young, In re Roebuck*, 864.
3. A dissolution of partnership was advertised in the Gazette, and a circular sent in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner: *Held*, that the notice was insufficient to take the debts out of the reputed ownership of the firm. The plant and stock in trade was taken possession of by the same partner, and used in his separate trade after the dissolution: *Held*, that it was in his separate reputed ownership. — *Ex parte Sprague, In re Brewster*, 866.
4. A petition for arrangement under the 12 & 13 Vict. c. 106, § 211, dismissed on the application of the petitioning trader, with the consent of the creditors, although he had complied with the statutory requisitions. — *Anonymous*, 872.
5. A summons to a person supposed to be capable of giving information touching the bankrupt's estate, will not in general be granted on the

application of the bankrupt without the concurrence of the assignees. — *Ex parte Dinsdale, In re Dinsdale*, 873.

6. It is not imperative upon the commissioner to require a bond under the 12 & 13 Vict. c. 106, § 78, or the general orders, but is a matter within his discretion, having regard not only to the solvency of the alleged debtor, but to all circumstances of the case, including the probability of success in an action for the demand. Where, therefore, the demand was made in respect of differences in purchases and sales of a commodity arising from the mere turn of the market, neither party having or intending to buy or sell the commodity itself, it was held not to be a proper case for requiring a bond.

Quære, whether such a demand could be enforced, or was not a gambling transaction. — *Ex parte Wood, In re Wood*, 875.

7. A firm were holders of a joint and several promissory note made by a father and son. The son assigned all his property to trustees for the benefit of his creditors, who were expressed to be parties to the assignment, and to be named in a schedule, and the deed purported to contain an absolute release of the debts without any reservation of rights against sureties. One of the trustees was a partner in the above-mentioned firm, and the deed was executed by him and *the * 922 other trustees, but not by any other creditor. It was also executed by the son with the privity and concurrence of the father. Upon its execution as an act of bankruptcy, an adjudication was pronounced against the son: *Held*, that even assuming the father to have joined in the note as a surety merely, and the partner to have executed the deed as a creditor, and not merely as a trustee, the father's liability was not discharged. It is not universally necessary, in order to reserve on a composition deed remedies against sureties, that the reservation should be expressed in the deed. — *Ex parte Harvey, In re Blakely*, 881.

8. Where the time had elapsed during which the bankrupt would have been at liberty to dispute the adjudication, a petition to annul presented by a creditor at the bankrupt's instigation, was dismissed with costs. — *Ex parte Emery, In re Bradbury*, 901.

9. *Quære*, whether holding shares in a mine carried on under a license to get ores at a royalty, determined by the quantity got and sold, is a trading within the bankrupt law. — *Ibid.*, 901.

BARON AND FEME. See **HUSBAND AND WIFE**.

BEGIN, RIGHT TO. See **APPEAL. PRACTICE**, 8.

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CALL. See **WINDING-UP ACTS**, 1, 3.

CHAMBERS. See **CHARITY. PRACTICE**, 2.

CHANCERY AMENDMENT ACT. See **PRACTICE**, 5.

CHARGE.

Primâ facie, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, and which he does not except.

When the owner of an estate has also a charge upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say that without some special act, no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate; but where the intermediate estate is

* 923 created by the * act of the owner himself, this reasoning has no application.

A., the devisee in fee of real estates subject to a trust to raise 6000*l.* for B., which the testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate and to go to A., on his marriage conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6000*l.*, and died, living B. On B.'s death without children, the representatives of A. filed a bill to establish the charge: *Held*, under the circumstances, that it had merged in the inheritance. — *Johnson v. Webster*, 474.

See WILL, 9.

CHARITY.

The 28th section of the Charitable Trusts Act (16 & 17 Vict. c. 137) confers on the Master of the Rolls and the Vice-Chancellors at Chambers the same jurisdiction as they would have exercised before the passing of that Act in a suit regularly instituted or upon petition.

New trustees of a charity having been appointed under the Act 16 & 17 Vict. c. 137, by the Vice-Chancellor, and the surviving trustee being lunatic, it is competent for the Vice-Chancellor in chambers to make the vesting order under the Trustee Acts, 1850 and 1852. — *In re Davenport's Charity*, 839.

See RELIGIOUS TRUST.

CHECK. See PUBLIC COMPANY, 2. TRUST.

CHIEF CLERK. See PRACTICE, 2.

CHOSE IN ACTION. See MORTGAGE, 2.

CLERK.

Under the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, § 8, it is the duty of an attorney to enrol the articles of his articulated clerk, and where he had omitted to do so, the Court dismissed a claim to foreclose a mortgage given to secure the premium. — *Dufaur v. Sigel*, 520.

COMMITTEE-MAN. See WINDING-UP ACTS, 2.

COMPANY. See COMPROMISE. MINE. PUBLIC COMPANY. WINDING-UP ACTS.

COMPOSITION DEED.

1. A creditor cannot be said in any sense to have acceded to the provisions of a composition deed, unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed.

By a composition deed for winding up, under an inspector, the affairs of a partnership in Calcutta, it was, among other things, provided that four members of the * partnership should collect and pay the * 924 assets into the hands of the inspector, to be applied by him, after payment of costs, in payment among the several creditors of the partnership who should have become parties to, and have executed or otherwise acceded to the terms of the deed; but if a commission of bankruptcy or an adjudication of insolvency should be awarded, issued, or prosecuted against the partnership, or any of them, in respect of their then debts or liabilities, before any release should be executed, the deed should thenceforth be actually void. The plaintiffs, who were indorsees of two bills of exchange drawn by the partnership, remitted the bills from London to their agents in Calcutta, who, in April, 1848, forwarded them "to the trustees" of the partnership to be registered. The partners, acting under liquidation, acknowledged the receipt of the bills, and, with respect to one of them, wrote, "We have registered the claim you make on our estate;" and with respect to the other, "We have duly noted the claim," returning the bills, which were transmitted back to the plaintiffs in London. In February, 1849, the inspector advertised a dividend of 10*l.* per cent, which was shortly afterwards paid on several of the debts of the creditors who had executed the deed. In March, 1849, four members of the partnership were, on their own petition in India, adjudicated insolvent, and thereupon the inspector handed over to their official assignee the balance remaining in his hands. The plaintiffs having received dividends on the bills under the insolvency in India, and from other parties in England liable upon the bills, in 1851 instituted this suit against the inspector for the payment of the 10*l.* per cent dividend advertised by him: *Held*, that the plaintiffs, not being precluded from suing any of the parties liable upon the bills, could not be considered to have acceded to the composition deed. — *Forbes v. Limond*, 298.

2. A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor: *Held*, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors. — *Close v. Close*, 176.

See BANKRUPTCY, 7.

* COMPROMISE.

* 925

To render valid the compromise of a litigation, it is not necessary that the question in dispute should really be doubtful, if the parties *bond fide* consider it to be so. Therefore where, after the decision in *Bright v.*

Hutton (3 H. of L. 341), a person placed on the list of contributors as an allottee and provisional director, agreed to pay a sum in discharge of his liability under a compromise approved of by the Master, he was not allowed to recede from the agreement, on the grounds that he had misapprehended the decision in *Bright v. Hutton*, and that there was really no question to be the subject of a compromise. — *Lucy's Case*, 356.

CONDITIONS OF SALE. See VENDOR AND PURCHASER, 1.

CONSTRUCTION. See WILL, 3.

CONTRIBUTORY. See WINDING-UP ACTS, 1.

COSTS.

1. Testator by his will directed his trustees, after payment of the expenses of keeping his estates in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and, after payment thereof, to pay the rents to A. and B. successively for life, with remainder to trustees to preserve, with remainder to the first and other sons of B. successively in remainder, and the several heirs male of the bodies of such sons. On a bill filed by the trustees at the instance of one of the remainder-men in tail, against the second tenant for life, for the purpose of making him accountable for permissive waste: *Held*, that the costs of the trustees whose bill was dismissed, ought to be paid out of the corpus, and not out of the rents and profits of the estate. — *Powys v. Blagrove*, 448.
2. Under the Act for facilitating the Conveyance of Workhouses (5 & 6 Will. 4, c. 69), which enables the poor-law guardians to purchase, but not compulsorily, lands of persons under disability, and empowers the Court to order the expenses attending the purchase payment into Court, or application for reinvestment, to be paid by the poor-law guardians, but makes no further provision for payment of the expenses of the investigation of title on a reinvestment: *Held*, that such expenses are, on the interpretation of the whole Act, payable by the poor-law guardians. — *In re Byron's Settlement*, 694.

See BANKRUPT. CROWN. PRACTICE, 3. PRINCIPAL AND SURETY. TAXATION.

* 926 * COST BOOK. See MINE.

COUNSEL. See PAUPER.

COVENANT. See LANDLORD AND TENANT, 1.

CREDITOR'S SUIT. See LUNATIC.

CROWN.

The solicitor for the affairs of the treasury, as nominee of the Crown, having taken out letters of administration to the goods of an intestate, on the assumption that he had died without next of kin: *Held*, not entitled to the costs of a suit instituted by a person rightfully claiming as next of kin.

The nominee of the Crown had successfully resisted, in a previous suit, an unfounded claim by a person wrongfully asserting a title as next of kin,

and in the suit of the rightful claimant there had been the usual decree for an account, with all just allowances: *Held*, without deciding that the costs of the previous suit might have been included under just allowances, that inasmuch as no objection had been taken to the chief clerk's certificate by the nominee of the Crown, he was precluded from raising the question as to his right to the costs of defending the previous suit, when the cause came on before the Court for further consideration. — *Kane v. Reynolds*, 565.

See SEA-SHORE.

DEBT. See LANDLORD AND TENANT, 2. MORTGAGE, 2.

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DISABILITY. See COSTS, 2.

DISPUTING. See BANKRUPTCY, 8.

DISSOLUTION. See BANKRUPTCY, 3.

DONATIO MORTIS CAUSA.

A testator, four days before his death, said to his wife, "I am a dying man; you will want money before my affairs are wound up." On the following day he gave his wife a crossed check, and, on the next day but one, remembering that the check was crossed, he asked a friend who visited him to take it, and give the wife another for it, which the friend did, but his check was post-dated. The testator's check was paid before the testator's death to his * friend, who after that event * 927 gave to the widow a check not post-dated for the other: *Held*, that the transaction constituted a good *donatio mortis causa*. — *Boutts v. Ellis*, 249.

DOWER. See ELECTION.

EAR-MARK. See PUBLIC COMPANY, 2. TRUST.

ELECTION.

A testator bequeathed to his wife an annuity payable out of part of his real estate, and he devised other real estate to trustees upon trust on the youngest of his nephews and nieces coming of age to sell and to divide the proceeds among his nephews and nieces; the testator gave to the trustees an express power to lease and also a general power to manage, and to cut timber for the purpose of repairs at their discretion: *Held*, that the widow was bound to elect between the annuity and her dower.

Held, also, that in order to raise a case of election against the widow, it must be shown from the will that the husband intended to dispose of the property subject to dower in a manner inconsistent with the right to dower; and that the power to lease given to the trustees was a sufficient

evidence of such intention; further, that the powers to manage and to cut timber were inconsistent with the right to dower. — *Parker v. Sowerby*, 321.

See PRINCIPAL AND SURETY.

ENROLMENT. See PATENT.

EQUITABLE RIGHTS. See VENDOR AND PURCHASER.

ESTATE TAIL. See SHELLEY'S CASE, RULE IN.

EVIDENCE.

1. On a question of legitimacy there were in evidence a sentence of nullity of a marriage of a minor for want of her father's consent, and a statement in the parish register that the marriage took place by license with the consent of the mother of the bride, but saying nothing as to the father's consent. There was, however, evidence leading to the conclusion that the sentence had been obtained by collusion between the husband and wife, and that the father had been aware and did not disapprove of the match: *Held*, fifty years after the date of the sentence of nullity, that the marriage ought to be presumed valid. — *Harrison v. Mayor, &c., of Southampton*, 137.

* 928 2. A testator by his will bequeathed personal estate to J. W. upon trust for his the testator's wife absolutely, and in case his said wife should die in his lifetime he directed that all his said estate should be held by his said trustee upon certain trusts (which failed), and subject to those trusts he bequeathed all his property to J. W. absolutely: *Held*, that the gift to J. W., was dependent on the event of the testator surviving his wife, and that J. W. did not become entitled from the mere fact of the gift to the wife failing to have practical operation.

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again; on the question being raised between the next of kin of the testator, and J. W., who claimed under the limitations of the will: *Held*, first, that the *onus* of proof that the husband was the survivor was upon J. W.; secondly, that it was requisite to produce positive evidence in order to enable the Court to pronounce in favour of the survivorship; and, thirdly, that no such evidence having been produced, the next of kin was entitled.

By the law of England, the question of survivorship in cases of the above description is matter of evidence, and not of positive regulation and enactment, as in the French Code, and in the absence of evidence there is no conclusion of law on the subject.

The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his title. — *Underwood v. Wing*, 633.

3. After the time for closing the evidence in a cause has expired, the Court will not, under the 15 & 16 Vict. c. 86, § 38, extend it, except under special circumstances.

Both parties may abstain from filing their affidavits till immediately before the

- expiration of the time fixed for closing the evidence. — *Thompson v. Partridge*, 794.

EXECUTOR.

1. A testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the good-will of the concern. The credit in which the bank was, rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account as a customer. After his death the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration * of * 929 the testator's estate: *Held*, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank. — *Simpson v. Chapman*, 154.
2. A testator gave his leasehold estate, held for lives, to his son and his heirs, subject to an annuity of 100*l.* for his daughter for life, and charged with the payment after her death of 2000*l.* to her children, and appointed his son executor. The testator died in 1807, and his son proved his will, and his personal estate, exclusive of the leaseholds, was sworn under 2000*l.* In 1821 the son signed a document from the Legacy Duty office, professing to have retained the sum of 2000*l.*, in respect of the legacy charged on the leaseholds, and on that document there was a formal receipt by the proper officer "for 20*l.* for duty on account of the personal estate within mentioned." The lives in the lease having expired, and the lessors having declined to renew, on a bill filed by a child of the testator's daughter against the representatives of the son to have the 2000*l.* secured: *Held*, first, that the entire leasehold interest was chargeable with its payment at the testator's death, and, secondly, that the conduct of the son with respect to the payment of the legacy duty, fourteen years after the death of the testator, amounted to a sufficient admission of assets to answer the legacy of 2000*l.*

Payment of probate duty is presumptive evidence of an admission, but not an absolute admission, of assets to the extent covered by the amount of duty paid. — *Lazonby v. Rawson*, 556.

3. A direction in a will that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's payment than was employed in it at his decease, nor does such a direction, coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at his death in the trade, for the purpose of carrying it on.

Therefore, where the husband of an executrix, under such a will, borrowed money from a person in whom the legal estate of part of the testator's real estate was vested under a satisfied mortgage, stating that the

advance was required to carry on the testator's business, and deposited the deeds with the lender, on an agreement that the legal estate still subsisting in him should be a security for the advance: *Held*, that the security was invalid against the persons beneficially interested under the will.

Quære, whether, if the will had authorized the mortgage, it could have been created without a deed acknowledged by the executrix.

Hankey v. Hammock, 3 Madd. 148, observed upon. — *M'Neillie v. Acton*, 744.
See POWER, 2,

• 930 • FEE. See PRACTICE, 4.

FEME COVERT. See EXECUTOR, 3. HUSBAND AND WIFE.

FIDUCIARY. See SOLICITOR, 1.

FOLLOWING TRUST MONEY. See PUBLIC COMPANY, 2. TRUST.

FOREIGN COURT. See INFANT.

FRAUD. See SPECIFIC PERFORMANCE, 2. SOLICITOR, 1.

GAMING. See BANKRUPTCY, 6.

GUARANTEE. See PRINCIPAL AND SURETY.

HEIR. See SHELLEY'S CASE, RULE IN.

HUSBAND AND WIFE.

A separation deed in which the husband covenants with a surety that he will not visit the wife without the surety's consent, does not contemplate reconciliation and subsequent separation, so as to be void as being contrary to public policy.

Where a husband in a separation deed covenanted with a surety (who covenanted to indemnify the husband against the wife's debts) to pay the wife an annuity for life: *Held*, that a subsequent agreement between the husband and surety, that if the wife returned to live with the husband, the annuity should continue, was valid and enforceable in equity. — *Webster v. Webster*, 437.

See EXECUTOR, 3.

IMPERTINENCE. See PRACTICE, 3.

INCUMBRANCE. See CHARGE. MORTGAGE, 1, 2. VENDOR AND PURCHASER. WILL, 9.

INFANT.

The Court of Chancery has jurisdiction over the custody of the children of an English subject, though such children were born and are resident abroad. A married woman residing in France, on whom service had been substituted, having intrusted to her by the French Court the interim custody of her children until the result of certain proceedings

instituted by her in this country for a divorce was ascertained, ordered by the Lord Chancellor to concur with her husband in taking all necessary steps for the purpose of delivering up the children to him, with the view to their being brought over to and educated in * England. She appealed from the Lord Chancellor's order, and * 931 successfully resisted her husband's application in the French Court for the delivery of the children, on the ground of the pendency of the appeal. On the matter being again brought before the Lord Chancellor, he made another order upon the wife in the same terms, but requiring compliance within a week, and prefaced with a declaration, that, by the law of England, an appeal from an order pronounced by the Lord Chancellor does not suspend its operation. — *Hope v. Hope*, 328.

INJUNCTION. See LANDLORD AND TENANT, 1. WASTE.

ISSUE. See WILL, 3.

JOINT-STOCK COMPANY. See COMPROMISE. WINDING-UP ACTS, 1, 3.

JUDGMENT. See MORTGAGE, 2. SPECIFIC PERFORMANCE, 4.

JURISDICTION. See INFANT.

LACHES. See SPECIFIC PERFORMANCE, 6.

LANDLORD AND TENANT.

1. By a lease empowering the lessee to build, he covenanted to cultivate the part of the demised land, on which no buildings should be erected, in a husband-like manner, and there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor; but, being obliged to discontinue the manufacture by an indictment, he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor, in pursuance of an agreement between them: *Held*, that the lessor had not in equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down, and an injunction to restrain an action of ejectment was dissolved.

Quære, whether a statement framed thus, "it being at variance with the intention, &c.," is a sufficient allegation of a fact in a bill. — *Hills v. Rowland*, 430.

2. By agreement in writing A. B. agreed to grant, and C. D. agreed to accept, a lease of lands in Jamaica for twenty-one years at a certain rent: C. D. entered into possession, and died without having paid any rent: *Held*, that A. B. was not entitled to rank as a specialty creditor against the estate of C. D. in respect of the rent due.

Held, also, that the agreement and entry under it did not, in the absence of any payment of rent or * any admission of rent being * 932 due, create the relation of landlord and tenant between the parties; and that the creation of that relation was necessary in order to enable A. B. to sustain his claim, even if the lands had been in England.

Held, also, that the right to treat rent as a specialty debt is incident to privity of estate, and not to privity of contract, and would not, therefore, apply to the case of lands out of England. — *Vincent v. Godson*, 546.

See SPECIFIC PERFORMANCE, 5, 6.

LAND-TAX. See VENDOR AND PURCHASER.

LEGACY. See EXECUTOR, 2. WILL, 4, 8.

LEGITIMACY. See EVIDENCE, 1.

LESSEE. See LANDLORD AND TENANT. SPECIFIC PERFORMANCE, 5, 6.

LETTERS-PATENT. See PATENT.

LIEN. See SOLICITOR, 2.

LUNATIC.

A commission *de lunatico inquirendo* was issued against a man, on the petition of his wife, and he was found lunatic, and died: *Held*, that if the proceeding was for his benefit, the solicitor employed in it by the wife was entitled to institute a creditor's suit in respect of his costs. — *Chester v. Rolfe*, 798.

MALE LINE. See WILL, 1.

MARRIAGE. See EVIDENCE, 1.

MARRIED WOMAN. See EXECUTOR, 3. HUSBAND AND WIFE.

MERGER. See CHARGE. WILL, 9.

MINE.

By one of the rules of a mining company, carried on under the "cost-book principle," it was provided that any shareholder might determine his responsibility or liability upon giving notice in writing to the purser of his desire of retiring, and upon depositing with the purser the transfer of the shares held by him, and signing a relinquishment of all claims or demands on the company in respect of such shares: the prospectus of the company also stated, that under the cost-book principle, shareholders had the right of determining their responsibility by giving notice of their intention to relinquish their shares, and on forfeiture of all previous payments. A. B., a shareholder *in the company, gave notice in writing to the purser of his desire to retire, and thereby relinquished all right and title to his shares: *Held*, on winding up the company, that, under the terms of the rule as explained by the prospectus, A. B. had by his notice absolved himself from all liability to the past and future debts of the company. — *Fenn's Case*, 285.

See BANKRUPTCY, 9. WINDING-UP ACTS, 3.

MISAPPREHENSION. See SPECIFIC PERFORMANCE, 3.

MORTGAGE.

1. A widow who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise 2000*l.* for her benefit, and subject thereto in trust to convey the estates as the testator's daughter by a former marriage should direct.

The daughter borrowed money upon the security of a mortgage of some of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that the daughter had directed the widow and her co-trustee to make such conveyance as was thereafter contained, the widow and her co-trustee, as devisees in trust, by the direction of the daughter, conveyed the estates to the mortgagee upon trusts for sale and for payment of the mortgage debt, and of the surplus as the daughter should appoint, and subject thereto according to the trusts of the will: *Held*, —

That the mortgage did not pass the beneficial interest of the widow.

That, nevertheless, her charges must be postponed to the mortgage, she having concurred in it, without reserving her priority. — *Stronge v. Hawkes*, 186.

2. Where a debt not legally assignable has been equitably assigned for value, and the debtor has had notice of the assignment, all payments which he may thereafter make to the purchaser on account of the debt are well made, so far as the debtor is concerned, although the purchaser may have sold the debt, provided the debtor has no notice of the sale; nor is it absolutely necessary for him on making such payment to require production of the original assignment.

A judgment debtor had left his residence in embarrassed circumstances. His brother-in-law paid the debt, took an assignment of it, and afterwards mortgaged it, but the mortgagees gave no notice of their security to the debtor, whose residence at that time it did not appear that they had the means of ascertaining. The brother-in-law possessed himself of property of the debtor, and a settlement of accounts took place between them * (in which the judgment debt formed an item), * 934 ending with the payment of the balance to the judgment debtor, and a general mutual release of all claims, including the judgment debt. The judgment debtor had no notice of the mortgage, but did not obtain or require the delivery up of the assignment of the judgment debt: *Held*, that the mortgagees had no claim upon him in respect of it. — *Stocks v. Dobson*, 11.

See BANKRUPTCY, 1, 2. CHARGE. EXECUTOR, 3. SET-OFF. VENDOR AND PURCHASER.

NEXT OF KIN. See CROWN. EVIDENCE, 2.

NOTICE. See MORTGAGE, 2. VENDOR AND PURCHASER.

NUDUM PACTUM. See PRINCIPAL AND SURETY.

OFFICIAL ASSIGNEE. See BANKRUPT.

ONUS PROBANDI. See EVIDENCE, 2.

ORDER. See TRUSTEE ACT.

ORDER AND DISPOSITION. See BANKRUPTCY, 1, 2, 3.

PARLIAMENT. See PRIVATE ACT OF PARLIAMENT.

PAROL EVIDENCE.

Parol evidence is admissible to enable the Court rightly to understand in what sense words are used in a deed, just as evidence is afforded by a dictionary which enables us to translate a foreign language, or by a book of science, which gives us the meaning of words of art; but where the aid of parol evidence is invoked for the purpose of contradicting the express provisions of a deed, then such evidence is inadmissible.

In the year 1751, some members of the Methodist body, followers of John Wesley, purchased a chapel, which was duly conveyed to trustees, upon trust that the appointment of the preachers thereof should be made by John Wesley, during his life, and, after his death, by the trustees. Upon an information in 1853, filed at the relation of two members of the body of Wesleyan Methodists, for the purpose of establishing the right in the Conference of appointing preachers to the chapel, and of removing those of the trustees who asserted the right of appointment in opposition to the Conference: *Held*, that parol evidence was inadmissible to prove that the provision *in the deed giving the appointment of the preachers to the trustees, was inconsistent with the paramount objects of its founders, and would, after the death of John Wesley, clash with the general system of Methodism. — *Attorney-General v. Clapham*, 591.

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See WILL, 8.

PARTITION.

Semble, that a devise on trust to sell and dispose of property, consisting partly of an undivided share, does not authorize the trustees to concur in a partition.

But where trustees had under such a trust concurred in a partition which was shown to be beneficial to the *cestuis que trustent*, who were infants, the Court, on a claim to which the infant *cestuis que trustent* were parties, made a decree that the lands should be taken to be divided according to the partition already made. — *Brassey v. Chalmers*, 528.

PARTNER. See MINE. PUBLIC COMPANY.

PARTNERSHIP.

After the dissolution of a partnership between two share-brokers, one of them deposited with the bankers of the firm shares contracted to be purchased by the firm before the dissolution, with power to sell the shares, in order to raise the requisite funds to complete the purchase: *Held*, that the power of sale was not an unauthorized delegation of the powers of a member of a dissolved firm, but was valid and effectual.

The authority of a partner continues after a dissolution for all purposes of winding up, and, if it be unduly exercised, the remedy is by applying to the Court for the appointment of a receiver. — *Butchart v. Dresser*, 542.

See BANKRUPTCY, 3. EXECUTOR, 1. WINDING-UP ACTS, 2, 3.

PATENT.

After a judgment in *scire facias* in the Court of Queen's Bench, annulling letters-patent, and directing that they should be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment, his duty in cancelling the enrolment being only ministerial. — *Regina v. Eastern Archipelago Co.*, 199.

PAUPER.

Where a plaintiff had obtained an order to sue *in formâ pauperis*, and the defendants had answered, and replication had been filed: *Held*, that the defendants could not, three years afterwards, have the order to sue *in formâ pauperis* discharged for irregularity.

A pauper is not entitled to have his bill dismissed without costs on an *ex parte* application.

A pauper who has had counsel assigned to him cannot argue his

* case in person. — *Parkinson v. Hanbury*, 508.

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PAYMENTS, APPROPRIATION OF. See **TRUST.**

PERPETUITY.

A testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and, on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead: *Held*, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not. — *Gooding v. Read*, 510.

PETITION. See **BANKRUPTCY**, 4.

PETTY BAG.

Where a petition is presented in the petty bag in Chancery to the Lord Chancellor, the clerk of the petty bag is the proper officer to draw up the order pronounced on such petition. — *Regina v. Eastern Archipelago Company*, 199.

PLEADING. See **LANDLORD AND TENANT**, 1. **PRACTICE**, 1.

POLICY. See **ANNUITY**. **WILL**, 4.

POOR-LAW GUARDIANS. See **COSTS**, 2.

POWER.

1. It is not so settled that a power to appoint "by deed or deeds, writing or writings under hand and seal," can now be well exercised by an unsealed will, that a purchaser can be forced to take a title depending on that proposition. — *Collard v. Sampson*, 224.

2. A testator devised land subject to payment of his debts to A. and B., their heirs and assigns, and he authorized his executors thereafter mentioned, with the approbation of his trustees for the time being, to sell any part of his estates: *Held*, that the surviving executor, with the assent of trustees appointed by the Court of Chancery (in whom the devised lands were vested by a vesting order), could make a good title. — *Brassey v. Chalmers*, 528.

See **TRUSTEE ACT.**

PRACTICE.

1. The conduct of an administration suit was taken from the plaintiff and given to a defendant. The Master afterwards was of opinion that the suit had been defective from the beginning for want of parties, and suspended the prosecution of the inquiries directed by the decree, to enable the defect to * be supplied: *Held*, that a bill for that purpose filed by the defendant having the conduct of the suit without previous notice to the plaintiff was not irregular, so as to entitle the plaintiff to move to take it off the file, and a motion to that effect was refused with costs. — *Lys v. Lee*, 219.
- * 937 2. A Judge in chambers is not empowered, under the 26th section of the Act (15 & 16 Vict. c. 80), to entertain applications with reference to funds paid into Court under the Acts for the Relief of Trustees (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74); such applications must originate in and be founded upon a petition presented to the Court. — *In re Hodges*, 491.
3. On dismissing a claim, the Court may direct the defendant to pay the costs of any scandalous and impertinent portions of his affidavits. *Quære*, whether it can also order the defendant to pay any portion of the costs of the suit. — *Dufaur v. Sigel*, 520.
4. Special order made by the Lord Chancellor, that, instead of the sum payable under the 6th Order of 25th October, 1852, as a further fee for the certificate upon the passing of a receiver's and manager's account, there should be paid such a fee as the Judge to whose Court the cause was attached should think reasonable.
- In another case the Lord Chancellor directed the fee under the same order to be paid on each 100*l.* of the net profits of the business over which the receiver and manager had been appointed. — *Wells v. Wales*, 816.
5. Order made under the 52d section of the Act (15 & 16 Vict. c. 86), for the prosecution of a suit against the assignees of a defendant become bankrupt after appearance, but before answer, with liberty for the assignees to answer, if they should be so advised. — *Lash v. Miller*, 841.
6. The 15 & 16 Vict. c. 86 does not give the Court jurisdiction to make a decree merely declaratory of a legal right. — *Trustees of Birkenhead Docks v. Laird*, 732.
7. Mode of appealing from the certificate of a Judge's chief clerk made in conformity with an opinion expressed by the Judge. — *Rhodes v. Ibbetson*, 787.
8. On an appeal from an order on further directions, the appellant's counsel have the right to begin. — *Freer v. Hesse*, 495.
9. The principle on which substituted service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant. — *Hope v. Hope*, 328.

See BANKRUPTCY, 1, 2, 5. EVIDENCE, 8. PARTITION. PAUPER.

PRESUMPTION. See EVIDENCE, 1, 2.

* 938 * PRINCIPAL AND SURETY.

By an agreement between bankers, a customer and a surety, the surety

guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, and simultaneously with it a second agreement was entered into between the bankers, the customer and surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of attorney, and the customer became bankrupt: *Held*, —

1. That the agreement to issue execution was not *nudum pactum*.
2. That by the omission to file the warrant of attorney the surety was discharged.
3. That the surety who had pleaded to an action on the guarantee, and then filed a bill for an injunction, had put the bank to unnecessary costs, and could only be relieved in equity on paying the costs at law subsequent to the declaration. — *Watson v. Allcock*, 242.

See BANKRUPTCY, 7. COMPOSITION DEED.

PRIORITY. See MORTGAGE, 1.

PRIVATE ACT OF PARLIAMENT.

A private Act of Parliament does not repeal a former private Act by implication.

Where, therefore, a private Act of Parliament gave power to commissioners to construct a sea-wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it, under the superintendence of the engineer of the commissioners, it was *held*, that under a subsequent Act empowering a dock company to take some adjoining lands and to make such works for the purposes of their undertaking "as they might deem expedient," the power thus conferred was subject to the provisions of the former Act. — *Trustees of Birkenhead Docks v. Laird*, 732.

PROOF. See BANKRUPTCY, 7.

PUBLIC COMPANY.

1. A bill in Parliament to authorize a railway company to grant a lease in perpetuity to another railway company of certain projected lines was opposed by a third railway company, who withdrew their opposition on an agreement being come to that during the continuance of any lease to be authorized by the Act the companies should * par- * 939 ticipate in portions of each other's profits, and that the two former companies should not take traffic on specified portions of their lines.

Held, differing from the opinion of Lord COTTENHAM on a demurrer (2 M. & G. 324), that the agreement was *ultra vires*, and ought not to be specifically performed.

Held, also, on the construction of the whole agreement, that if valid it would

have come into operation, although only a portion of the projected lines was completed.

The directors of a railway company are trustees (in an important sense of the word) of their statutory powers, and an agreement entered into by the company amounting to a breach of trust will not be enforced to the prejudice, or not according to the views of all or some of the shareholders, at the instance of parties cognizant of the circumstances.

The last of the foregoing propositions is not inconsistent with *Hawkes v. Eastern Counties Railway Company*, 1 DeG., M. & G. 737. — *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company*, 115.

2. Committee-men of a provisionally registered railway company entered into an agreement with two incorporated canal companies for the purchase of the canals by the railway company, in the event of power being obtained from Parliament for that purpose, with a proviso that the committee-men should provide out of their own moneys a deposit, which was to be forfeited if no Act should be obtained. The deposit was paid by a check headed with the name of the railway company, signed by three committee-men, and countersigned by the secretary. It was paid by means of a credit transferred to the account of the railway company from that of another provisionally registered railway company, by some of the committee-men who were directors of both. This transaction was not within their powers in either capacity, but the money was subsequently repaid to the latter railway company out of the funds of the former. No Act was obtained; the first-mentioned railway company was dissolved, and was ordered to be wound up: *Held*, —

That, notwithstanding the unauthorized transfer of credit, the deposit was trust money of the first-mentioned railway company, as between its subscribers and the canal companies.

That the form of the check, and the circumstances under which it was received, affected the canal companies with notice of the trust.

That a suit sanctioned by the Master under the Winding-up Act, by one of the subscribers to the first-mentioned railway company, on behalf of himself and the other subscribers, except those who were * defendants, against the canal companies, the committee-men, and the official manager of the railway company for the recovery of the deposit, was properly constituted. — *Bryson v. Warwick and Birmingham Canal Company*, 711.

See COMPROMISE. WINDING-UP ACTS, 1, 2.

PUBLIC POLICY. See HUSBAND AND WIFE.

RAILWAY COMPANY. See PUBLIC COMPANY, 1. WINDING-UP ACTS, 1.

RECEIVER. See PARTNERSHIP. PRACTICE, 4.

REFUSAL TO CONVEY. See TRUSTEE ACT.

REGISTRY. See SPECIFIC PERFORMANCE, 4.

REINVESTMENT. See COSTS, 2.

RELIGIOUS TRUST.

Where a fund is raised for a charitable purpose, like that of founding a chapel, and the contributors are so numerous as to preclude the possibility of their all concurring in any instrument declaring the trusts, and such a declaration of trust is made by the persons in whom the property is vested at or about the time when the sums have been raised, that declaration may reasonably be taken *prima facie* as a true exposition of the minds of the contributors. — *Attorney-General v. Clapham*, 591.

REMAINDER. See **SHELLEY'S CASE, RULE IN.**

REMOTENESS. See **PERPETUITY.**

RENT. See **LANDLORD AND TENANT**, 2.

REPUTED OWNERSHIP. See **BANKRUPTCY**, 1, 2, 3.

RESIDENCE. See **WILL**, 6.

RESIDUARY LEGATEE. See **COMPOSITION DEED**, 2.

REVIVOR. See **PRACTICE**, 5.

SALE. See **PARTITION. POWER**, 2.

SCANDAL. See **PRACTICE**, 3.

SEA-SHORE.

In the absence of all evidence of particular usage, the extent of the right of the Crown to the sea-shore landwards is *prima facie* limited * by * 941 the line of the medium high tide between the springs and the neaps. — *Attorney-General v. Chambers*, 206.

SENTENCE. See **EVIDENCE**, 1.

SEPARATION. See **HUSBAND AND WIFE.**

SERVICE. See **BANKRUPTCY**, 1. **PRACTICE**, 9.

SET-OFF.

An estate was mortgaged in 1841 for 2000*l.*, with interest at 5*l.* per cent. In 1842 the mortgagor died, and in the same year the devisees of the equity of redemption sold by auction the mortgaged premises, together with other lands of the mortgagors, for 2700*l.*, to the mortgagee. The usual deposit was paid at the time of the sale, and by the conditions of sale 4*l.* per cent was payable on the balance of the purchase-money. The mortgagee entered into possession in 1842, and remained in such possession until her death in 1847, when her devisees entered into possession. Upon a claim filed by the devisees of the mortgagor against the devisees and executors of the mortgagee for specific performance of the contract to purchase, eleven years after the sale, no demand having been made during that period either for the payment of the residue of the purchase-money into Court, or for interest on the mortgage : *Held*, under the circumstances, that a set-off *pro tanto* was to be inferred at the date when possession was taken by the mortgagee, and that, from that period, interest at 4*l.* per cent only was payable upon the balance of the purchase-money. — *Wallis v. Bastard*, 251.

SHELLEY'S CASE, RULE IN.

A testator by his will devised all his real estate to A. B., his eldest son,

for ninety-nine years, if he should so long live, and subject thereto to trustees and their heirs during A. B.'s life, in trust only to support contingent remainders, with remainder to the heirs of the body of A. B., and for want of such issue to his second son in like terms. By a codicil, the testator, after confirming his will, devised his real estate to trustees upon certain trusts for the payment of debts and securing a jointure for his wife: *Held*, that the trustees were bound, after providing for the jointure and debts, to convey the estates to the same uses as those declared by the will; that the heirs of the body of A. B. took by purchase, and that no equitable freehold resulted to A. B., so as to attract the operation of the rule in *Shelley's Case*, and create an estate tail in A. B.

- Semble*, the rule in *Shelley's Case* applies only where the remainder is created by the same instrument, * which creates the particular estate.
 * 942 — *Coape v. Arnold*, 574.

SOLICITOR.

1. An attorney was engaged in the sale of his client's property by auction, on which occasion a small portion only of the property was sold. He was subsequently employed in making out abstracts of title of the portion unsold; and sixteen months after the completion of the abstracts, during which term there had been no employment of the attorney professionally by the client, the attorney bought a portion of the unsold property, and debited the client in his books for drawing the agreement for sale. The consideration which was on the face of the purchase-deed stated to have been paid, was in fact composed partly of a previous debt for costs, and partly of such an annuity as the balance of the purchase-money would, according to the government tables, obtain for a healthy life. The client died three years and a half after the sale. It was in evidence that the client was of intemperate habits for many years previously and up to the transaction in question. It did not appear that the attorney had made any special inquiries as to the state of health of the client, or endeavoured in any other quarter to obtain a higher annuity, which from the intemperate habits of the client might in all probability have been procured: *Held*, on a bill filed by the heir-at-law of the client, to set aside the transaction, that the relation of attorney and client subsisted at the time of the sale, and that the attorney had failed to show that no industry he was bound to exert would have got a better bargain for his client, and the sale was accordingly set aside. — *Ho'man v. Loynes*, 270.
2. On a lease being granted, the lessee deposited it with the lessor's solicitor (who acted for the lessor and lessee) together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors, and received from them, without any authority from the lessee, the lease and the bill of exchange: *Held*, —

That without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors.

That evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights independently of express contract. — *Gibson v. May*, 512.

See CLERK. TAXATION.

* SPECIALTY DEBT. See LANDLORD AND TENANT, 2.

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SPECIFIC PERFORMANCE.

1. In a contract for the sale of leasehold hereditaments, it was agreed that the vendor should produce a good and marketable title commencing from the freeholder, but that no title should be called for prior to the lease. In the course of the investigation of the title, it was stated that the lease had been granted in pursuance of a prior contract, the benefit of which had been the subject of a security, which was by the same statement represented as having been satisfied: *Held*, —

That the purchaser was entitled to investigate the dealings with the contract prior to the lease being granted.

That stipulations as to title in a contract between a vendor and a purchaser are to be construed favourably to the latter, though not contained in conditions of sale exclusively prepared by the vendor. — *Rhodes v. Ibbetson*, 787.

2. The executrix of a lessee agreed to sell to A. the residue of her term (except a day) and the fixtures on the premises for 400*l*. This agreement was entered into by the executrix without advice, and there was no written memorandum of it except a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l*. A., on hearing of this, offered the executrix, if she would complete her contract with him, 1000*l*. as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A. for the whole term wanting a day: *Held*, —

That the original agreement (if any) with A. was such in its nature and circumstances as not to be of any validity in equity, unless the price was shown to be equal or more than equal to the value of the property.

That as this was not shown the landlord was entitled to a specific performance of his agreement, not only against the executrix, but against A.

Quære, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the Statute of Frauds. — *Goodwin v. Fielding*, 90.

3. A mortgagee, with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee, with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted

- * 944 upon * having the conveyance under the power of sale; and on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, showing that the above-mentioned clause was inserted by inadvertence, and that she never intended to incur the risk of opening the foreclosure by conveying under the power: *Held*, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power. — *Watson v. Marston*, 230.
4. A mortgagee took, on the execution of his mortgage in 1844, an assignment of a term to a trustee, and, relying on it, forbore to search for judgments.
- A judgment had been registered in November, 1843. The mortgagee sold in 1846 under a power of sale in his mortgage; and, on the purchaser objecting to complete without the concurrence of the judgment creditor, the mortgagee and his solicitor, and the mortgagor, to obviate the objection, made a statutory declaration, that, at the time of the mortgage, neither the mortgagee nor the solicitor had any notice of the judgment. The purchaser still insisted on his requisition, and in March, 1848, the vendor filed a bill for specific performance. During the proceedings in the Master's office, the five years from the registration of the judgment expired, and it was not re-registered till 1850: *Held*, that, at the hearing on further directions, in 1853, the purchaser could not be compelled to complete without the concurrence of the judgment creditor.
- Held*, also, that though the question was one of conveyance, yet, as it had occasioned the suit, the vendor submitting to obtain the concurrence required must pay the costs.
- Seemle*, that a title depending on the fact of the vendor having been a purchaser, without notice of a registered judgment, cannot be forced upon a purchaser. — *Freer v. Hesse*, 495.
5. In a suit to compel the defendant specifically to perform an agreement to take a lease: *Held*, that under the circumstances of the case the intended lessee had waived his right to call for the title of the intended lessor.
- Form of the decree in this case directed as in *Warren v. Richardson* (Younge, 1).
- The mere fact of taking possession does not, either in the case of vendor and purchaser, or in that of lessor and lessee, operate as a waiver of the purchaser's or lessee's right to call for the vendor's or lessor's title, though an intention to waive the right is less probable in the former than in the latter instance. — *Simpson v. Sadd*, 665.
6. By an agreement for the lease of a coal-mine it was stipulated that the rent and terms of working the mine should be determined by
- * 945 * R. H. and J. S., and in case of their not agreeing then that the same should be determined by a person to be nominated by R. H. and J. S. before entering upon the reference: R. H. and J. S. chose J. P. as an umpire, entered upon the reference, but refused to

examine any witnesses: an award was ultimately made signed by R. H., J. S., and J. P., with which the intended lessee was dissatisfied: a suit was after the lapse of a considerable time instituted by the intended lessor to compel a specific performance of the agreement, and various grounds of objection to the award were raised by way of defence: *Held*, dismissing the bill, first, that the award must under the circumstances of the case be treated as that of the referees only; secondly, that it was not a valid objection that the referees had refused to examine witnesses, or that one of the referees, instead of himself inspecting the mine, had acted on the report made to him by another person; thirdly, that it would not have been a valid objection if the referees had consulted the umpire merely for the purpose of enabling them to form their own opinion; and, fourthly, that it was a valid objection that the referees consulted the umpire, and then, instead of making up their own minds and if disagreeing leaving the matter to the umpire to be determined by him, had made an award which was contrary to the opinion of one of the referees.

Seemle, that it was also a valid objection that the award had not been signed by the referees at the same time.

The award being made on the 13th April was communicated to the intended lessee on the 10th June, and was on the 8th August objected to by him on the grounds above mentioned: the Court, though inclined to consider that the objections were taken in good time, did not decide the point, for it held that the lessors were by subsequent conduct prevented from raising the question.

The intended lessee, after objecting to the award, continued to work the mine, but finally abandoned it in February, 1849: the plaintiff did not file his bill until July, 1852. *Seemle*, this delay would have been sufficient to prevent the Court from making a decree for specific performance. — *Eads v. Williams*, 674.

STATUTE OF FRAUDS. See SPECIFIC PERFORMANCE, 2.

SUMMONS. See BANKRUPTCY, 5, 6.

SUPPLEMENTAL. See PRACTICE, 1, 5.

SURETY. See BANKRUPTCY, 7. COMPOSITION DEED, 2. PRINCIPAL AND SURETY.

* SURVIVORSHIP. See EVIDENCE, 2.

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TAXATION.

A mortgagor, without giving six months' notice, requested the mortgagee to accept payment and to transfer the mortgage. The transfer being executed, the mortgagee's solicitors refused to deliver it or the title-deeds to the mortgagor without payment of their bill of costs. The mortgagor's solicitor objected to items amounting to less than 9*l.* in all, but paid the full amount in order to obtain the deeds: *Held*, that the above were not such special circumstances as to subject the bill to taxation after payment.

Semble, that one of the special circumstances required is overcharged, and that an item objected to, not because the business was not done or because the charge was excessive, but because the liability to pay it is disputed, is not such an overcharge as to be sufficient ground for taxing a paid bill. — *In re Finch and Shepherd*, 108.

TIME. See BANKRUPTCY, 8. EVIDENCE, 3.

TITHES.

By the decree made under the London Tithe Act (37 Hen. 8, c. 12), it is provided that the inhabitants of London shall pay 2s. 9d. in the pound for tithe upon the rent reserved; or if a less rent is reserved by reason of any fine, or if the owners are also occupiers, then the tithe is to be paid at the same rate upon the rent at which the premises were last letten for without fraud or covin: *Held*, that the decree assumes that every house has a rent attached to it or representing it, and except in case of invariable rents which have remained, or are assumed to have remained, unchanged since the passing of the Act, the word rent, as there used, means rack-rent, and where the house is not let, it means the full value to let.

The defendant was the lessee of premises in London, which were let for a term of sixty years at a reserved rent (including insurance) of 102l. 10s., in consideration of the lessee laying out 2000l. in building thereon; the improved annual value of the property after the building was completed was 250l.: *Held*, that, under the statute, the defendant must be considered as owner of the house during the term, and that the tithe must be paid at 2s. 9d. in the pound on the full annual value of 250l.

The second resolution in *Skidmore v. Bell*, 2d Inst. 660, to the effect that such houses as were never letten to farm, but inhabited by the owner, is a *casus omissus* and shall pay no tithes by force of * the decree, is not now law. — *Vivian v. Cochrane*, 818.

TITLE. See SPECIFIC PERFORMANCE, 1, 5.

TRADE. See EXECUTOR, 3.

TRADER DEBTOR. See BANKRUPTCY, 4, 7.

TRADING. See BANKRUPTCY, 9.

TREASURY, SOLICITOR TO. See CROWN.

TRUST.

When a trustee pays trust money into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository, and so remained; and the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money, in every sense his own. But checks drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed and affect the account in the mode explained and laid down in *Clayton's Case*, 1 Mer. 572. — *Pennell v. Deffell*, 372.

See EXECUTOR, 1, 3. MORTGAGE, 2. PARTITION. PERPETUITY. POWER, 2.
RELIGIOUS TRUST. WILL, 5.

TRUSTEE.

1. A testator, entitled to realty and personalty, including a leasehold colliery, gave his general residuary estate to trustees, in trust to sell at a convenient time, with the approbation of his son, and out of the income to pay the testator's daughter for her life such an annuity as should be 200*l.* a year, over half the income of the residuary estate, but not to exceed 600*l.* a year; and so that any annual overplus, after paying 600*l.* a year to the daughter and 400*l.* a year to the son, should go to the son, whom the testator constituted his residuary legatee, and appointed co-executor with the trustees. The trustees disclaimed. The son acted in the trusts, and did not sell the colliery, but carried it on till the mines were exhausted, paying out of his own moneys so much of the testator's debts as the testator's personal property, other than the colliery, was insufficient to satisfy, and paying the daughter 600*l.* per annum, out of the profits of the colliery, so long as they lasted:
Held, —

That although the sale of the property was to take place with the son's approbation, he was not, after assuming to act as sole trustee,
* entitled to postpone the sale to his sister's prejudice. * 948

That the son was chargeable with the value of the colliery at the end of a year from the testator's death, and with interest at 4*l.* per cent, and that the value ought, under the circumstances, to be calculated at the aggregate amount of the actual annual profits treated as deferred payments. — *Lord v. Wightwick*, 803.

2. The expression attributed to the Lord Chancellor in *Attorney-General v. Hardy*, 1 Sim. N. S. 338, with respect to the removal of dissentient trustees, observed upon. — *Attorney-General v. Clapham*, 591.

3. An executor and trustee having for several years retained funds in his hands uninvested which he ought to have invested: *Held* not to be chargeable with interest at five per cent, or upon the principle of annual rests, but with simple interest only at four per cent, there being no circumstances to lead to the conclusion that he had made any profit by his misconduct.

- The principle applicable to charging executors and trustees with interest in such cases considered.

The Court will only charge an executor or trustee with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive, and misconduct on the part of an executor or trustee will not, generally speaking, warrant such a presumption. — *Attorney-General v. Alford*, 843.

See CHARITY. POWER, 2.

TRUSTEE ACT.

A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the Master, whereby 1000*l.* per annum was to be

appointed as the plaintiff's jointure. On his refusal to obey the decree: *Held*, that under the Trustee Acts, 1850 and 1852, he might be declared a trustee of all the rights, interests, estates, and property acquired by him under the settlement, and the Court appointed a person to execute the requisite deed in his place under the Trustee Act, 1850. — *Ex parte Countess of Mornington*, 587.

See CHARITY.

TRUST MONEY. See PUBLIC COMPANY, 2.

UNDERTAKING. See WINDING-UP ACTS, 1.

UNMARRIED. See WILL, 2.

VENDOR AND PURCHASER.

* 949 The question, when it is sought to affect a purchaser with constructive notice, is not whether he had * the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.

The abstract of title of real estate disclosed the fact that the land-tax had been redeemed thirty-three years previously to the sale by persons acting as the guardians of an infant tenant in tail, out of the personal estate of the infant, who died a bachelor without having attained his majority, and in a suit instituted shortly afterwards by the personal representatives of the infant against the then tenant in tail in remainder, a decree was made declaring them entitled to charge the estate with an amount equal to the consideration money paid for the redemption. A deed was prepared for the purpose of charging the estate accordingly, which was duly executed by the then tenant in tail in remainder, but he died without having suffered a recovery. The succeeding tenant in tail entered, suffered a recovery, and sold the estate to a purchaser for valuable consideration, who had no express notice of the facts above stated: *Held*, on a bill filed by the administrator *de bonis non* of the infant tenant in tail against the purchaser, that the omission on his part to inquire whether the redemption of the land-tax might not have been so effected as to have given to third persons equitable rights, of which there was no trace on the face of the abstract, did not amount to gross negligence, and that he ought not therefore to be affected with constructive notice of such equitable rights. — *Ware v. Lord Egmont*, 460.

See SET-OFF. SOLICITOR, 1. SPECIFIC PERFORMANCE, 1, 2, 3, 4, 5.

WAIVER. See COMPOSITION DEED, 2.

WAIVER OF TITLE. See SPECIFIC PERFORMANCE, 5.

WASTE.

A Court of Equity will not interfere at the instance of a remainder-man, in cases of permissive waste, either by injunction or to give satisfaction

against an equitable tenant for life in possession. — *Powys v. Blagrove*, 448.

WIFE. See HUSBAND AND WIFE.

WILL.

1. A testator directed that the interest and dividends of the remainder of his stock should be invested so as to accumulate until the end of twenty-one years from his death, when the whole was to be disposed of towards his then nearest of kin in the male line in preference to the female line: *Held*, that the son of the testator's paternal * uncle was not * 950 entitled, in preference to the testator's sister. — *Boys v. Bradley*, 58.
2. A testator gave 5000*l.* to be invested in the names of trustees for the benefit of a tenant for life, and at his death, the principal to his son and unmarried daughters as he might by will direct, and, failing such direction, to them equally: *Held*, that "unmarried daughters" meant those who were unmarried at the date of the codicil. — *Hall v. Robertson*, 781.
3. A testator, before the Wills' Act came into operation, devised his "estate" at A. to S. K. for life, charged with life annuities, but in case the annuitants, or any one of them, survived S. K., he gave the aforesaid "estate" to S. K.'s eldest surviving son, charged with the annuities, but in default of issue male he gave the aforesaid "estate" to T. K., charged in like manner, and unto his eldest son upon the same conditions, but in default of issue male the premises were to descend to the testator's heirs, charged as above: *Held*, —
 That the limitation to S. K.'s eldest surviving son ought not to be construed literally so as to make it dependent on S. K. being survived by one of the annuitants.
 That the words in default of issue male were not to be construed referentially as meaning in default of an eldest surviving son, but generally, so as to give S. K. an estate in tail male.
 That the use of the word "estate" was not in the above will sufficient to give the eldest surviving son of S. K. an estate in fee-simple.
 That where, upon the careful perusal of an instrument, it is impossible not to be satisfied that a strict and ordinary interpretation of its language would disappoint the intention with which it was framed, such an interpretation is not to be adopted. — *Key v. Key*, 73.
4. A shareholder in an assurance company bequeathed all and every his "shares and interest" in the company, and "all the advantages to be derived therefrom." There was also a general residuary bequest. The rules of the company required each shareholder to effect, or procure to be effected, an assurance to a prescribed amount, and provided that one-third of every bonus on a policy should be added to the capital of the company: *Held*, upon the whole context of the will and codicils, that neither the moneys made payable by a policy effected by the testator on his own life nor the proportion of a bonus payable in respect of the policy passed under the above words to the specific legatees. — *Harington v. Moffat*, 1.
5. A testator, by his will, devised all his real estates to trustees for ninety-

* 951 nine years, without impeachment of waste, and, subject thereto, to the use of his son for life, without impeachment of waste, * with remainder to the use of his granddaughter for life, without impeachment of waste, with remainder to her first and other sons in tail, &c. The trustees of the term were, in the event of his personal estate being deficient, to raise money to pay debts and legacies. The will contained an express provision against cutting down any timber on the estates, except for necessary repairs, until the granddaughter should attain twenty-one, at which time the trustees were empowered to cut such timber "as they shall think fit," and to sell and pay the proceeds to the granddaughter. The son entered into possession, and died before the granddaughter attained twenty-one. She then became tenant for life. Some time afterwards, and after she attained her majority, the trustees sold the term by auction in order to pay debts. It was stated in one of the conditions of sale that the estate was sold subject to any rights under the provisions in the will: *Held*, that the will created no obligatory trust in favour of the granddaughter, but that the power to the trustees to cut, &c., was merely discretionary. — *Watlington v. Waldron*, 259.

6. A testator by his will desired that his wife might reside during her widowhood in the freehold house in which he dwelt. After directing his business to be carried on by his executrix (who was his wife) and his executors, so long as they thought expedient, he gave the house, stock in trade, and the residue of his property to his executrix and executors, upon trust to pay the wife an annuity of 20*l.* so long as the business should be carried on, and when his youngest child attained twenty-one, to sell the business, stock, and effects, together with the house, and out of the proceeds to pay the wife during her widowhood an annuity of 54*l.* 10*s.* instead of one of 20*l.*, and, subject thereto, trusts were declared for the benefit of the children: *Held*, that the widow's right to reside in the house ceased upon the sale. — *Chapman v. Gilbert*, 366.

7. By a will trustees were directed to pay the income of a trust fund to the testator's nephew for his life, weekly, monthly, or quarterly, as they should think fit, with a declaration that if the nephew should anticipate, assign, or otherwise incumber the income, or attempt so to do, the trust should be void, and the trust fund fall into the residue. Eighteen months after the testator's death and before any payment had been made to the nephew, he assigned as a security (so far as he lawfully could, without creating a forfeiture of his interest in the income of the legacy) all money due to him on account of the income, but not any future income: *Held*, that the assignment was valid. — *In re Stulz's Trusts*, 404.

* 952 8. A testatrix was the owner of * four debentures of the Spanish government, each of which had impressed upon it the words "Capital 1000*l.*," and purported to secure to the holder 50*l.* per annum in perpetuity, but to be redeemable on payment of "55*l.* per cent on the nominal amount." By her will she bequeathed thus: "The sum of 2000*l.* Spanish bonds or coupons now belonging to me, and all dividends which

shall be due to me thereon at the time of my decease:” *Held*, that two only of the debentures passed, and that parol evidence of declarations of the testatrix as to her intention was inadmissible.

Held, also, by Lord Justice TURNER, that where there is a specific bequest, parol evidence is admissible to show what property there is answering to the description of it; but that, if on that evidence it appears that there was property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property. — *Horwood v. Griffith*, 700.

9. Freeholds were devised upon trust to raise 2000*l.* “by sale or otherwise,” and to permit the testator’s son P. to enjoy the estate “after raising as aforesaid,” for his life, with trusts in remainder for P.’s children, and in the event (which happened) of P. dying without leaving issue, in trust for S. and T. in common in fee. Trusts were declared of the 2000*l.*, which, as to 1000*l.*, were for a daughter of the testator for life, and, after her death, for her children. The 2000*l.* was not raised till after the death of P., who survived S. and T., and kept down the interest of the 2000*l.* The daughter afterwards died without ever having had a child: *Held*, —

That the 2000*l.* was a charge upon the devised estate, and not an exception out of the devise, and, therefore, as to the above 1000*l.*, sank upon the daughter’s death, for the benefit of the inheritance.

That the 1000*l.* formed part of the real estates of S. and T. at their decease. — *In re Cooper’s Legacy*, 757.

10. The words “next heir” occurring in a will in a bequest of an annuity for life to be enjoyed by the next heir to a certain title and estate: *Held*, by reference to the context, not to have been used in their strict sense, but to mean the person next presumptively entitled to succeed to the title and estate. — *Dormer v. Phillips*, 855.

See COSTS, 1. ELECTION. EXECUTOR, 2, 3. PARTITION. • PERPETUITY. POWER. SHELLEY’S CASE, RULE IN. TRUSTEE, 1.

WINDING-UP ACTS.

1. The solicitors of a provisionally registered railway company, by the authority of a meeting, consisting * of three provisional di- * 953 rectors, sent to applicants for shares, with the letters of allotment, a letter stating, that, in the event of the Act not being obtained, the directors undertook to return the whole of the deposits without deduction. The company was wound up under the Winding-up Acts. *Held*, —

That a call was properly made upon the three directors for the whole amount of the expenses and the costs of winding up the company.

That a director who had acted in that capacity after the meeting authorizing the letter of allotment, but before the letter had been sent, and had not objected to it, was not liable to contribute.

That a director who had been plaintiff in an action against a stranger, in which the declaration stated the above undertaking to have been given by the directors, and who had been a defendant to a suit in Chancery instituted by the stranger, and had by his answer admitted to the same

effect, had not thereby conclusively adopted the undertaking, but might adduce evidence to show that the admission in the answer was made by mistake.

That upon an appeal of a contributory from a call, the appellant may show that he ought not to have been placed on the list of contributories. — *Lord Londesborough's Case*, 411.

2. Where a subscriber's agreement authorizes the managing committee of a provisionally registered company to bind the members and to make regulations and by-laws, it is not beyond the powers of the committee to order that the checks of any three of them shall be sufficient, and a check so drawn will not render any one of the committee more liable than the other members of the company, without proof of the money having come into his hands. — *Maitland's Case*, 769.

3. A joint-stock company was formed in England for working mines in Germany, subject to the terms of a deed of settlement, which provided that the capital should be 50,000*l.*, and gave no powers to the directors to raise money except by the creation of new shares. That capital was paid up and proved insufficient for working the mines. The wages of the miners being in arrear, and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts and preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the company, not for payment of debts, but for carrying on the business of the company in its ordinary course, and they afterwards repaid the bankers these advances. The company * was wound up under the Winding-up Acts :

* 954

Held, —

That the advances made by the shareholders to pay debts of the company might be set off by them with interest against a call.

That although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers, the directors being trustees, and in that character entitled to indemnity from their *cestuis que trustent* against expenses *bond fide* incurred.

That the distinction between advances by shareholders to pay necessary expenses and a loan contracted by them is a sound one. — *Ex parte Chippendale, In re German Mining Company*, 19.

See COMPROMISE. PUBLIC COMPANY, 2.

WORKHOUSES. See Costs, 2. \

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